APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JUNE 23, 1977

CERTIORARI GRANTED NOVEMBER 14, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
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CECIL LIVESAY and DOROTHY LIVESAY,
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CIVIL DOCKET

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

73 C 517

Cecil Livesay
and
Dorothy Livesay
vs.

Punta Gorda Isles, Inc.
Wilber H. Cole
Alfred M. Johns
Robert J. Barbee
Samuel A. Burchers, Jr.
Russell C. Faber
John Matarese
Robert C. Wade
Earl Drayton Farr, Jr.
John W. Douglas, D.D.S.
Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery)

Date	Proceedings
1973	
July 27	Complaint filed and summons issd.
Aug. 13	Order filed. Cause herein assigned to Court 3, Judge Wangelin presiding.

Aug. 21 Bryan, Cave, McPheeters & McRoberts enter appearance for deft Coopers & Lybrand; said deft granted to & includ. Sept. 20, 1973, to answer or otherwise respond to the complaint.

Aug. 24 By leave of Court defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., John Matarese, Robert C. Wade, and John W. Douglas granted to and including September 20, 1973, to answer and otherwise respond with respect to the complaint of plaintiffs; Peper, Martin, Jensen, Maichel and Hetlage appears specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said defendants to object to process, venue or jurisdiction—per memo fld.

Sept. 5 Plffs' first amended complaint filed.

Sept. 6 Plffs' request for production of documents filed.

Sept. 19 Deft Coopers & Lybrand granted an addnl 20 das., to & including October 10, 1973, to answer or otherwise respond to plff's 1st amended complaint.

Sept. 20 By leave of court defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., John Matarese, Robert C. Wade, and John W. Douglas granted to and including October 12, 1973 to answer or otherwise respond with respect to the complaint of plffs. Peper, Martin, Jensen, Maichel and Hetlage appear specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said defts to object to process, venue or jurisdiction.

Sept. 20 By leave of court deft Earl Drayton Farr, Jr. granted to and including October 12, 1973 to answer or

otherwise respond with respect to the complaint of plffs. Peper, Martin, Jensen, Maichel and Hetlage appear specially for the purpose of this extension of time only and for no other purpose, reserving all rights of said deft to object to process, venue or jurisdiction.

Oct. 2 Marshal's returns on summons, etc. filed as follows: Deft Coopers & Lybrand served 8-1-73; Punta Gorda Isles, Inc, Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, John Matarese, Robert C. Wade, served 8-7-73; Samuel A. Burchers, Jr. served 8-16-73; Russell C. Faber served 9-21-73; Earl Drayton Farr, Jr. served 8-30-73; and John W. Douglas served 8-9-73.

Oct. 5 By leave of court, defendants other than Coopers & Lybrand granted until Wednesday, October 10, 1973 in which to file their response to plaintiffs' request for production of documents.

Oct. 9 Answer of deft Punta Gorda Isles, Inc. to plff's 1st amded complaint fi'ed.

Joint answer of defts Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, to plffs' 1st amded complaint filed.

Response to defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas to plaintiffs' request for production of documents filed, with attached Exhibits "A" and "B".

Oct. 10 Answer of deft Coopers & Lybrand to plffs' 1st amded complaint filed.

Oct. 18 Plffs' demand for trial by jury only with respect to the issue of liability filed.

Nov. 28 Interrogatories directed to plaintiffs by defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S., filed.

Dec. 3 Plffs' interrogs addressed to defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S., filed.

Dec. 10 Plffs' interrogs addressed to deft Coopers & Lybrand filed.

Dec. 19 By leave Plaintiffs granted until 1/20/74 in which to answer or object to interrogatories heretofore served upon them.

Dec. 28 Defts granted to & including Feb. 1, 1974 to answer or object to plffs' interrogs to defts Punta Gorda Isles, Inc. et al.

1974

Jan. 4 Deft Coopers & Lybrand granted until Feb. 8, 1974 in which to answer or object to the interrogs heretofore served upon it by plffs.

Jan. 22 Plffs' answers to interrogatories of defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr. and John W. Douglas filed.

Jan. 30 Set for jury trial on Monday, March 18, 1974. (Noticed—EM)

Jan. 31 By leave of court, defendants Punta Gorda Isles, Inc., et al. granted 15 additional days through February 16, 1974, to file answers to plaintiffs' first interrogatories which are not objected to.

Feb. 1 Objections of defts Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S. to interrogatories filed.

Feb. 4 Trial setting for 3/18/74 vacated to be rescheduled in September, 1974.

Feb. 8 Answers of defts Coopers and Lybrand to interrogs of plffs fld. Objections of deft Coopers & Lybrand to plffs' interrogs fld.

Feb. 14 Answers—separate answers of defts fld.

Answers—fld by plffs to interrogatories of defts Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., & John W. Douglas.

Mar. 27 Notice to Take Depo—of Robert L. Proost fld by plffs.

Apr. 11 Motion for Order to Determine That Class Action Can Be Maintained Under Rule 23—fld by plff. Oral argument requested.

Supporting Brief—fld with Exhibit A attached.

Apr. 16 Memo for Clerk—Comes now deft, Coopers & Lybrand, and, by leave of Court, is granted 30 addi-

tional days to & incl. 5/16/74, within which to file a Memorandum in Opposition to plff's Motion for Order to Determine That Class Action Can Be Maintained Under Rule 23.

Apr. 17 Order—filed, granting defts Punta Gorda, to and incl. 4/16/74 to file memo in opposition to pltffs; motion filed 4/11/74. (by endorsement on memo request of attys for Punta Gorda)

Apr. 17 Set for Jury Trial September 3, 1974.

Apr. 18 Parties present; Motion for order to determine that class action is maintainable under R. 23, passed to further order of the Court.

Apr. 30 Motion for Limited Stay of Discovery—filed, by attys for deft, Coopers & Lybrand w/Memo & (illegible) w/proposed order.

Apr. 30 Pre-trial conference had js 6.

May 6 Pltff's Brief in Opposition to Deft. Coopers & Lybrand's Motion for Limited Stay of Discovery fld. by Atty Green for pltff.

May 14 Memo Reply of Coopers & Lybrand's to Arguments Raised by Plaintiff's in Their Reply Memo,—fld. by Attys Riddle & Hennelly.

May 14 Memo & Order fld. deft's motion for limited stay R. 26(c) granted except relating to class action cc attorneys.

May 14 Copy of letter to J. Wangelin fld. confirming tel. conversation that deft is granted to Mon. May 20, to file its Memo in Opposition to Pltf's motion for Class Action Designation.

May 15 Motion of Defts. Punta Gorda Isles, Cole, Johns, Barbee, Burehrs, Faver, Matarese, Wade, Farr and Douglass fld to require pltffs to post surety bond w/aff. memo in support of same and proposed order by Atty Richter.

May 15 Memo of above defts in opposition to pltff's motion for order determining that a class action can be maintained fld by Atty Richter.

May 20 Motion of defts. Coopers, etc. pursuant to R. 12(b)(6) & 23 to dismiss Cts. I & II of pltffs 1st amend complaint as a class action with memo., fld by Atty Riddle for Coopers & Lybrand.

May 19 Motion for limited stay of discovery and reply, submitted to J. Wangelin.

June 3 Memo for Clerk fld. by leave pltffs granted until June 7, to submit reply memo on class action motion and motion for undertaking for costs.

June 6 Motions filed 5/20/74 submitted to J. Wangelin.

June 7 Reply brief in support of class action determination —fld on behalf of pltffs by Atty. Green.

June 7 Pltffs' brief in opposition to defts' motion to secure the payment of costs—fld on behalf of pltffs by Atty Green.

June 21 Memo of Deft Coopers & Lybrand in response to Pltffs Reply Brief on Motion for Class Action Determination and Motion of Coopers & Lybrand to Strike Affidavit of Rosenthal—fld by Attys for deft (V. Riddle)

June 21 Deposition of Cecil Livesay (2 vols) taken on behalf of all defts except Coopers & Lybrand and Deposi-

tion of Dorothy Livesay (same as Cecil Livesay) 1 vol. fld by Reporter Schroeder.

July 16 Memorandum & Order (HKW, J), fld. Deft's (Coopers & Lybrand) to Dismiss Cts I and II as a class Action, denied. Copy to Attys.

July 16 Memorandum & Order—fld. Defts' motion to req. plffs to secure payment of costs by posting bond, etc., Denied at this time. cc to Attys.

Aug. 30 Cause passed to further Order of Ct. Parties Notified.

Sept. 4 Motion of Plffs for an Order Enjoining Destruction of Documents with Suggestions in Support thereof, fld.

Sept. 4 Motion to Dissolve Stay Order Relating to Discovery, fld. by plffs.

Sept. 4 Motion to Compel Defts Punta Gorda Isles, Inc. and the Individual Defts. to Produce Copies of Certain Documents, fld. by plffs.

Sept. 12 By Ct. leave, Deft. Coopers & Lybrand granted an additional 9 days to and including 9/20/74 to respond to plffs' Motion for and Order Enjoining Destruction of Documents and Motion to Dissolve Stay Order Relating to Discovery.

Sept. 12 Memorandum of Deft. Punta Gorda Isles, Inc. and Individual Defts. in Opposition to Plffs' Motion to Dissolve Stay Order, fld.; Memorandum of Deft. Punta Gorda Isles, Inc. and Individual Defts. in Opposition to Plffs' Motion to Compel Production of Certain Documents, fld; and Memorandum of Deft Punta G. Isles, Inc. and Indiv. Defts. in Opposition to Plffs' Motion for an Order Enjoining Destruction of Documents, fld.

Sept. 18 Mtns. fld. 9/4/74 submitted to Judge Wangelin.

Sept. 20 Memorandum of Deft. Coopers & Lybrand in Oppo. to Plffs' Mtn. to Dissolve Stay Order Relating to Discovery.

Sept. 20 Memorandum of Deft. Coopers & Lybrand in Opposition to Plffs' Mtn. for an Order Enjoining Destruction of Documents.

Sept. 23 Further Suggestions and Aff. in Support of Plffs' Motion for an Order Enjoining the Destruction of Documents fld by Plffs.

Sept. 23 Further Suggestions in Support of Plffs' Motion to Dissolve Stay Order Relating to Discovery, fld.

Sept. 23 Order, fld. Mtns seeking an order enjoining des. of documents by deft, to dissolve a Stay Order, or in the alter. and Order modifying Stay Order, etc. Denied. Copy sent attys. of record.

Sept. 24 Suggestions by Punta Gorda Isles Defts in Oppo. to Plffs' Mtn. for and Order Enjoing the Destruction of Documents and Suggestions by Punta Gorda Isles Defts in Oppo. to Plffs' Mtn. to Dissolve the Stay Order.

Oct. 8 Plaintiff's Brief in Opposition to Deft Coopers & Lybrand's Motion to Modify the Court's Order dated 7/16/74, Relating to "Reliance", fld.

Oct. 5 Case Set for Trial, Mon., Dec. 16, 1974) (Jury).

Nov. 4 Copy of Petition for Writ of Mandamus filed in U.S.C.A., 8th Circuit (U.S.C.A. No. 74-1827) fld by Plffs received.

Dec. 5 Pre-Trial Conference had. Trial setting of 12/16/74 Vacated and Case passed to further Order of Ct.

Parties to appear 12/30/74 for hearing on Class Action.

Dec. 30 Parties appear for hearing on Class Action. Upon receipt or transcript, parties to file briefs.

1975

Jan. 17 Transcript of Hearing had 12/30/74 fld by Off. Ct. Rptr.

Feb. 7 Brief in Support of Motion to determine the Class Action be maintained under R 23—fld by Plffs.

Mar. 12 By leave of Ct. deft Coopers & Lybrand granted to and inc. 3/21/75 to file its Post Hearing Memorandum, etc.

Mar. 12 Post-Hearing Memorandum of Deft. Punta Gorda Isles, Inc. and the Individual Defts. in Opposition to Plffs' Motion for a Determination that this Action may Proceed as a Class Action, fld.

Mar. 20 Deft. Coopers & Lybrand granted to and inc. 3/31/75 in which to file its Memorandum in opp. to plff's mtn for a determination that action may proceed as a class action. (HKW, J)

Mar. 28 Coopers & Lybrand granted to 4/10/75 in which to file reply brief. (HKW, J)

Apr. 10 Post Hearing Memorandum of Deft. Coopers & Lybrand—Fld. in Opposition to Plffs' Motion for a Determination that this Action may Proceed as a Class Action.

Apr. 16 Plffs granted to and inc. 5/16/75 in which to file their post-hearing reply brief in support of their motion for class action determination.

May 14 Plffs granted up to and inc. 5/28/75 in which to file reply briefs in support of their motion for class action determination.

May 26 Motion of Plffs to Amend Count I of First Amended Complaint by Interlineation.

May 26 Amendment to Plffs' First Amended Complaint—fld.

May 26 Plffs' Post-Hearing Reply Brief Supporting Class Action Determination—fld.

June 6 Mtn of 5/28/75 submitted to Judge Wangelin.

June 17 Rejoinder of the Deft Punta Gorda Isles, Inc., & the Indiv. Defts to Plffs' Post-Hearing Reply Brief Supporting Class Action Determination—fld.

June 19 Memorandum and Order Filed—Ordered plffs motion to certify as class action pursuant to Rule 23, is granted, Lawsuit is certified as class action pursuant to Rule 23(B)(3) and Further Ordered case stayed pending final determination of matters to be dealt with in Courts show cause order attached. Copy mailed to Bryan Cave etc. and to Peper Martin, etc.

June 19 Show Cause Order to Anderson, Green, Fortus & Lander as Firm and to Mr. Martin M. Green personally Ordered to Show Cause Why Should Not Be Enjoined From Acting as Counsel for the Class. Hearing Concerning This Matter Will Be Held 10 AM 7/11/75. Copy of Show Cause order mailed to Bryan Cave etc and to Peper, Martin, etc alongwith copy of above memorandum and Order. Copy of Memorandum and Order and Show Cause Order delivered to Office U.S. Marshal for service on Anderson, Green, Fortus & Lander as a Firm and for service on Martin M. Green, individually—filed.

June 23 Return of OSC—fld. executed on Martin Green on 6/20/75.

June 23 Return of OSC—fld. executed on Anderson, Green. For Fortus & Lander on 6-20-75.

June 27 Motion of Martin M. Green and Anderson, Green, Fortus and Lander to Withdraw as Attys. for Plffs—Fld.

June 30 Memorandum for Clerk—Fld. Mtn of attys Green, et al to withdraw as Plffs attys. "So Ordered, HKW, J)" Attys. of record notified.

June 30 Entry of Appearance of Jared Spectrie, Milberg & Weiss, N.Y., N.Y. and Local Counsel Richard L. Ross, fld and approved. Attys. of record notified.

July 25 Motion to Dissolve Stay Orders—Fld by plffs.

Aug. 20 Mtn for Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel & Mtn to Modify & Supporting Suggestions—fld by deft Coopers & Lybrand, by leave.

Aug. 20 Motion for Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel—Fld by defts. Coopers & Lybrand.

Aug. 20 Motion to Modify—Fld by defts. Coopers & Lybrand.

Aug. 20 Suggestions in Support of Deft's Motions—Fld. by defts. Coopers & Lybrand.

Aug. 22 Suggestions of Punta Gorda Isles, Inc., and of the Indiv. Defts. in Support of the Motions by Cooper & Lybrand to Reconsider and/or Modify—Fld.

Aug. 14 Mtn to Amend Ct. 1 fld 5/28/75—Submitted to Judge Wangelin.

Aug. 26 Upon plffs application, plff granted to 9/5/75 to file briefs, in opp. to Mtn for Reconsideration, etc.—In memo for clerk, fld. (HKW, J)

Aug. 28 Mtn for Reconsideration, etc. fld 8/20/75 submitted to Judge Wangelin.

Sept. 4 Mtns fld 8/20/75 submitted to Judge Wangelin.

Sept. 5 Memorandum of Law in Opposition to Defts Motion to Amend This Court's Prior Decision on the Class Action With Affidavits of Cecil Livesay, Dorothy Livesay and Melvyn I. Weiss—Fld. by Plffs.

Sept. 8 Deft. Coopers & Lybrand granted to and inc. 9/22/75 in which to reply to plffs' responsive brief and pleadings with respect to defts' Mtns to Modify and Reconsider—In Memo for Clerk, fld. (HKW, J)

Sept. 11 Response of Deft. Punta Gorda Isles, Inc. and Individual Defts. to the Affidavit of M. I. Weiss and to Plffs' Memorandum of Law—Fld.

Oct. 22 Deft. Coopers & Lybrand's Reply Memorandum in Support of Its Motions for Reconsideration & Modification—Fld.

Oct. 23 Memorandum & Order—Fld. Plffs' mtn to dissolve Ct's Orders staying discovery and staying proceeding granted insofar as allowing discovery to Proceed as to names and addresses of members of the class.

Oct. 23 Memorandum & Order—Defts' Mtn to modify Ct's Order by defining the members of the class to include those defined in stipulation, etc. Granted: Defts' mtn to modify Ct's Order by defining those issues suitable for class action held in abeyance until such time as the period given in notice to be sent out to

members of class to petn the Ct. or to intervene expired: Parties shall submit proposed drafts of notice to be sent out to the class members within 30 days from date of this Order: and Plff directed to join the additional parties deft. for the reason stated, subject only to determination made by this ct in an in-camera conference if requested by Plffs' counsel. Copy of order sent attys. of record.

Nov. 21 Proposed form of Notice of Class Members in Case—Fld.

Nov. 24 Letter re proposed Class and Proposed Notice—Received.

Dec. 5 Proposed form of notice of Class Action fld. 11/21/75—Submitted to Judge Wangelin.

1976

Jan. 6 Proposed Notice of Pendency of Class Action, etc.—Mailed by Judge Wangelin to attys.

Mar. 1 Proposed Notice of Pendency of Class Action—Mailed attys. Attys. to respond no later than 3/26/76.

Apr. 9 Letter re Copy of Notice of Pendency as Class Action which counsel for plff will issue, etc.—Mailed attys. of record.

July 20 Ptf's Second Request for Production of Documents from Dft. Punta Gorda Isles, Icn. Fld.

July 23 Motion of Dft. Coopers and Lybrand to Decertify Class Action—Fld.

Suggestions in Support of Motion to Decertify Class —Fld.

Aug. 8 Plffs' Memorandum of Law in Support of Their 2nd Request for Production of Documents from Deft. Punta Gorda Isles, Inc.—Fld.

Aug. 9 Objections of Deft. Punta Gorda Isles, Inc. to Plffs' Second Request for Production of Documents—Fld.

Aug. 16 Memorandum of Deft. Punta Gorda Isles, Inc., in Opposition to Plffs' Second Request for Production of Documents—Fld.

Aug. 16 Cross Motion to Dissolve Stay Order and to Compel Production of Documents by Deft, Punta Gorda Isles, Inc.—Fld. by Plff.

Aug. 16 Plffs' Memorandum of Law in Opposition to Motion of Deft. Coopers & Lybrand to Decertify—Fld by Plffs.

Aug. 16 Affidavit of Plffs in Opposition to Motion to Decertify Class Action—Fld.

Aug. 16 Affidavit of Jerome M. Congress in Opposition to Motion of Deft. Coopers & Lybrand to Decertify Class Action—Fld.

Aug. 18 Response of Deft. Coopers & Lybrand to Plffs' Memorandum of Law in Support of Their 2nd Request for the Production of Documents From Deft. Punta Gorda—Fld.

Aug. 16 Mtn. fld 7/23/76 submitted.

Aug. 23 Plff granted until 8/30/76 to reply to response of Cooper & Lybrand etc.—In Memo for Clerk, fld.

Aug. 23 Memorandum of Deft & Indiv. Defts in Opposition to Plffs' Motion to Dissolve Stay Order—Fld.

Aug. 23 Memorandum of Deft. Coopers & Lybrand in Opposition to Plffs' Motion to Dissolve Stay Order—Fld.

Aug. 23 Supplemental Suggestions in Support of Deft. Coopers & Lybrand's Motion to Decertify—Fld.

Aug. 30 Reply Memorandum in Support of Their 2nd Request for Production of Documents From Detf. Punta Gorda Isles, Inc.—Fld by Plffs.

Sept. 1 Memorandum (HKW, J)—Fld.

Order (HKW, J)—Fld. Motion of various defts. to decertify case as class action Granted. Action Is Decertified as a Class Action. Matter to Proceed to Trial Only Upon Indiv. Claims of Cecil & Dorothy Livesay. Action to Be Set for Trial at Later Date. All Restrictions on Discovery Shall Be Lifted and That Discovery With Regards to Individual Claims of Cecil and Dorothy Livesay Shall Proceed in Normal Fashion. Copy of order and Memo sent attys.

Sept. 3 Deft Coopers & Lybrand's Request for Production of Documents Pursuant to F.R.C.P. 34 Directed to Plff—Fld.

Sept. 3 Interrogatories Directed to Plffs by Deft. Coopers & Lybrand—Fld.

Sept. 22 Plffs' Request for Production of Documents—Fld.

Sept. 28 Transcript of Conference in Chambers—Fld by Off. Ct. Reporter on 7/26/76.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Case No. 76-1881

Appeal From Eastern District of Missouri

Title of Case

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Appellants,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Appellees.

Date	Filings—Proceedings
1976	
Sept. 30	Certified copies of notice of appeal & docket entries rec'd from D.C. (1)
Sept. 30	Request for docketing fee (2)
Oct. 14	Docketed appeal.
Oct. 14	Appearance for appellants. (3)
Oct. 14	Designation of Record and Statement of Issues. (4)
Oct. 18	Appearance appellees (5)

Oct. 18 Appellees' Joint Designation of Additional Contents of Appndx to Br. (6)

Oct. 22 Appearance appellants (7)

Oct. 29 Joint motion of appellees to dismiss for lack of jurisdiction. (8)

Oct. 29 Memorandum in support of joint motion. (9)

Nov. 2 Received letter from Karen Holm correcting errors in mo to dismiss.

Nov. 11 Memorandum of appellants in opposition to joint mo of appellees to dismiss. (10)

Nov. 15 Received copy of memo of appellants in opposition to joint mo of appellees to dismiss. Signed copy by all counsel to be forwarded.

Nov. 19 Reply Memorandum in Support of Appellees' Joint Motion to Dismiss. (11)

Nov. 22 Appndx (2 vol.) (12)

Nov. 22 Brf aplnts (13)

Nov. 22 Ser w/apndx & brf aplnts (14)

Dec. 15 Law Clerk Memo w/1906

Dec. 20 Transferred to January session. w/1906

Dec. 23 Brf aplees Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Jones, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., & John W. Douglas (15)

Dec. 27 Rec'd ser for brf aplees (16)

Dec. 28 Brf aplee Coopers & Lybrand (17)

Dec. 28 Ser w/brf aplee (18)

1977

Jan. 3 Mo applnt for ext of time to file reply brief, with 1906. (19)

Jan. 5 Received Large Box of Original Files and Exhibits From Dist Ct, w-1906.

Jan. 7 Order: Appellants-petitioners may have thru January 10 to serve and file reply brief (20)

Jan. 10 Rep brf applnts-petitioners w/1906 (21)

Jan. 10 Ser w/rep brf (22)

Jan. 13 Argued and submitted (with 1906) to Judges Heaney, Stephenson, Stuart. Melvyn I. Weiss for appellant; John J. Hennelly for Coopers & Lybrand; William A. Richter for Punta Gorda Isles, et al. Rebuttal by Mr. Weiss.

Feb. 2 Received and forwarded to court letter from Martin M. Green.

Feb. 4 Received and forwarded to court letter from Veryl Riddle.

Mar. 4 Opinion by Judge Stephenson (Published) (23)

Mar. 4 Judgment: Judgment of district court is reversed and remanded to district court for proceedings consistent with opinion (24)

Mar. 18 Petition of appellees (all appellees except Coopers & Lybrand) for rehearing en banc and rehearing with service. (25)

Mar. 18 Petition of appellee (Coopers & Lybrand) for rehearing en banc and rehearing. (26)

Mar. 18 Certificate of service of petition for rehearing. (27)

Mar. 28 Order: Petitions of appellees for rehearing en banc and rehearing are denied (28)

Apr.	4	Mo appellees for stay of mandate. (29)
Apr.	8	Appellants' response to mo of appellees for stay of mandate. (30)
Apr.	12	Order: Appellees' stay for issuance of mandate denied (31)
Apr.	13	Mandate issued.
Apr.	14	Receipt for mandate (32)
Apr.	15	Appellants' bill of [illegible]. (33)
Apr.	15	Order: Sum of $1,836.19 for clerk's docketing fee, cost of preparation of appendix, appellants' brief and reply brief be taxed in favor of appellants for collection from appellees in district court (34)
June	29	Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1837 (as of 6/23/77) with No. 76-1906. (35)
June	30	Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1836 (as of 6/23/77) with No. 76-1906. (36)
Nov.	18	Order of Supreme Court granting certiorari in Case No. 76-1837 (w/76-1906) (37)
Nov.	18	Order of Supreme Court granting certiorari in Case No. 76-1836 (w/1906) (38)

Case No. 76-1906

Appeal From Petition for Writ of Mandamus

Title of Case

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Respondents,

and

Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division,
Respondent.

Date		Filings—Proceedings
1976		
Oct.	21	Docketed case
Oct.	21	Petition for Writ of Mandamus (Orig. & 4 with service) (1)
Oct.	21	Exhibits to Petition for Writ of Mandamus (5 copies) (2)
Oct.	26	Appearance respondent (3)
Oct.	26	Appearance respondent (4)
Nov.	3	Appearance petitioners (5)

Nov. 3 Appearance petitioners (6)

Nov. 18 Response of counsel for respondent Punta Gorda Isles, Inc., and individual respondents to petition for writ of mandamus. (7)

Nov. 18 Answer of Cooper and Lybran to Plaintiffs' Petition for Writ of Mandamus. (8)

Dec. 15 Law Clerk Memo. w/1881

Dec. 20 Transferred to January session. w/1881

1977

Jan. 3 Mo petitioners for ext of time to file reply brief, w/1881.

Jan. 5 Received Large Box of Original Files and Exhibits From Dist Ct, w-1881.

Jan. 7 Order: Appellants-petitioners may have thru January 10 to serve and file reply brief w/76-1881

Jan. 10 Rep brf applnts-petitioners w/1881

Jan. 10 Ser w/rep brf

Jan. 13 Argued and submitted (with 1881) to Judges Heaney, Stephenson, Stuart. Melvyn I. Weiss for appellant; John J. Hennelly for Coopers & Lybrand; William A. Richter for Punta Gorda Isles, et al. Rebuttal by Mr. Weiss.

Mar. 4 Opinion by Judge Stephenson (Published) w/76-1881. Petition for writ of mandamus is dismissed.

June 29 Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1837 (as of 6/23/77) with No. 76-1881.

June 30 Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-1836 (as of 6/23/77) with No. 76-1881.

Nov. 18 Order of Supreme Court granting certiorari in Case No. 76-1837 (w/76-1881)

Nov. 18 Order of Supreme Court granting certiorari in Case No. 76-1836 (w 76-1881)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFFS' FIRST AMENDED COMPLAINT

(Filed September 5, 1973)

COUNT I

Jurisdiction, Venue and Nature of Action

1. This Court has jurisdiction of this action under Section 22(a) of the Securities Act of 1933, as amended ("1933 Act"), 15 U.S.C. Section 77v and Section 27 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), 15 U.S.C. 78aa;

2. Plaintiffs bring this action under and pursuant to Sections 11, 12(2) and 17(a) of the 1933 Act, (15 U.S.C. §§ 77k, 77 l(2) and 77q(a)), Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. 78j(b) and 78t(a)) and Rule 10b-5 promulgated by the Securities and Exchange Commission ("SEC") thereunder (15 U.S.C. 78(j), 17 C.F.R. 240.10b-5);

3. Many of the acts and much of the conduct charged herein, including the preparation and distribution of Prospectuses pre-

pared by or with the aid, participation, acquiescence, encouragement, cooperation or assistance of the defendant Punta Gorda Isles, Inc. (hereinafter "Punta Gorda"), defendant Coopers & Lybrand and the individual defendants (all of the defendants will hereinafter be referred to collectively as "the defendants") and the sale of securities offered by the Prospectus occurred in the Eastern District of Missouri;

4. In connection with the acts and conduct alleged herein defendants directly and indirectly used the means and instrumentalities of interstate commerce and of the mails and the facilities of a national securities exchange registered with the SEC pursuant to the Exchange Act;

Parties

5. Plaintiffs Cecil Livesay and Dorothy Livesay are individuals residing in the City of Glendale, State of Missouri, who, as a result of the wrongs hereinafter alleged, purchased $5,000.00 worth of Punta Gorda's 6% Convertible Subordinated Debentures, due 1992 ("the debentures") and 100 shares of the common stock of Punta Gorda at a price of $18.00 per share, or $1800.00. The debentures and common stock were purchased on or about May 2, 1972, in connection with a Punta Gorda public offering of that date;

6. Defendant Punta Gorda is a corporation duly organized and existing under the laws of the State of Florida and maintains its executive offices at 1625 West Marion Avenue, Punta Gorda, Florida. The common stock of Punta Gorda is traded on the American Stock Exchange and the debentures are traded on the American Bond Exchange. The Company is principally in the business of developing and selling homesites at retail on the installment plan basis. In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period;

7. Defendant Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery) a partnership, is a national accounting firm with offices in major cities throughout the United States. Said defendant maintains an office at 411 North Seventh Street, St. Louis, Missouri, within the Eastern District of Missouri. At all material times, including the times of the wrongs alleged herein, defendant Coopers & Lybrand provided accounting services to defendant Punta Gorda; defendant Coopers & Lybrand was at all material times the auditor for Punta Gorda and certified certain of its financial statements, including the financial statements used in connection with the May 2, 1972, public offering referred to herein;

8. Defendant Wilber H. Cole is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the President and a director of Punta Gorda, who personally sold 116,010 shares of the common stock of Punta Gorda pursuant to the May 2, 1972, Prospectus;

9. Defendant Alfred M. Johns is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Chairman of the Board, Secretary and a director of Punta Gorda, who personally sold 55,560 shares of the common stock of Punta Gorda pursuant to the May 2, 1972, Prospectus;

10. Defendant Robert J. Barbee is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Vice President and a director of Punta Gorda;

11. Defendant Samuel A. Burchers, Jr. is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda,

Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein; was the Vice President and a director of Punta Gorda;

12. Defendant Russell C. Faber is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint, herein, including the times of the wrongs alleged herein, was the Financial Vice President and a director of Punta Gorda;

13. Defendant John Matarese is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Vice President of Punta Gorda;

14. Defendant Robert C. Wade is an individual who maintains an office at 1625 West Marion Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was the Treasurer of Punta Gorda;

15. Defendant Earl Drayton Farr, Jr. is an individual who maintains an office at 115 West Olympia Avenue, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was general counsel and a director of Punta Gorda;

16. Defendant John W. Douglas, D.D.S. is an individual who maintains an office at 209 N.E. Conway, Punta Gorda, Florida, and who at all times material to the Complaint herein, including the times of the wrongs alleged herein, was a director of Punta Gorda;

Class Action Allegations

17. During the period beginning May 2, 1972, and for at least several days thereafter, pursuant to the Registration State-

ment which was declared effective by the SEC on or about May 2, 1972, an undetermined number of persons purchased $15,000,000.00 principal amount of Punta Gorda's debentures and 171,570 shares of its common stock at a price of $18.00 per share, aggregating an additional $3,088,260.00; all of the foregoing debentures and common stock were purchased in reliance upon and as a result of the information contained in the aforesaid Registration Statement;

18. The class is defined as all of those persons who purchased the above-described debentures and shares of the common stock of Punta Gorda during the underwriting and public offering thereof which occurred on and following May 2, 1972;

19. Plaintiffs are informed and believe that the number of such purchasers of the said debentures and shares of common stock of Punta Gorda are so numerous that joinder of all of the class members in this action is impracticable;

20. Plaintiffs are adequate representatives of the class inasmuch as they have the same identical interests as all of the members of the class, and they will fairly and adequately protect the interests of the class;

21. There are questions of law and fact common to the class which include, *inter alia*, the following:

(a) Whether the defendants herein entered into and engaged in a course of conduct which fraudulently induced plaintiffs and the members of the class to purchase the debentures and shares of the common stock of defendant Punta Gorda for a grossly excessive consideration;

(b) Whether defendants, in order to effectuate such course of conduct, employed devices, schemes or artifices to defraud, obtain money or property by means of untrue statements of material facts or by omitting to state material facts necessary

in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices or courses of conduct which operated as a fraud and deceit on the purchasers of the said debentures and common stock of Punta Gorda in violation of Sections 11, 12(2) and 17(a) of the 1933 Act:

(c) Whether defendants, in order to effectuate such course of conduct, and in connection with such course of conduct, engaged in acts and conduct in violation of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC;

22. The foregoing questions of law and fact are common to the class and predominate over questions affecting only individual members thereof; the class action herein is superior to other methods for a fair and efficient administration of the controversy since the class is so numerous and geographically disbursed that joinder of all the members is impractical:

Cause of Action

Sections 11, 12(2) and 17(a) of the Securities Act of 1933

23. Plaintiffs allege that during the period of at least November 1, 1971, and possibly earlier, the exact dates being unknown to plaintiffs, defendants engaged in an unlawful combination and course of business pursuant to which defendants, among other matters, employed devices, schemes and artifices to defraud, obtain money by means of untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and courses of business and conduct which operated as a fraud and deceit upon purchasers of the debentures and common stock of Punta Gorda, all in violation

of Sections 11, 12(2) and 17(a) of the 1933 Act. The purpose and effect of these activities caused the plaintiffs and the members of the class they represent to purchase debentures and common stock of Punta Gorda for grossly excessive consideration ($1,000.00 for each debenture and $18.00 per share for the common stock) pursuant to the Registration Statement declared effective by the SEC on or about May 2, 1972;

24. The fraudulent practices and the devices utilized by the defendants in connection with and in order to effectuate the aforesaid result (the sale of $15,000,000.00 worth of debentures by Punta Gorda, and the sale by defendants Cole and Johns of 171,570 shares of the common stock of Punta Gorda at $18.00 per share, aggregating $3,088,260.00) consisted of, *inter alia*, the following false representations by defendants, knowing them to be false when made, and the following concealments of or failures to disclose material facts necessary, in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiffs and the members of the class, all or part of which are contained in (or omitted from) the Registration Statement of Punta Gorda and the Prospectus which is a part of such Registration Statement, dated May 2, 1972:

(a) The defendants failed adequately to disclose and falsely represented the financial condition of Punta Gorda;

(b) The defendants failed adequately to disclose and falsely represented the results of operations, including the results of operations of Punta Gorda at least for the following periods:

(i) The years ending December 31, 1967, December 31, 1968, December 31, 1969, December 31, 1970, and December 31, 1971;

(ii) The three months period ending March 31, 1971, and March 31, 1972;

(c) The defendants failed adequately to disclose that new accounting rules and guidelines had been proposed by the American Institute of Certified Public Accountants and were imminent with respect to Punta Gorda's operating statements, and that they would require a materially adverse restatement, retroactively applied, of the earnings of Punta Gorda for 1967 through 1971 and for the first three months of 1972. Notwithstanding such fact, the Prospectus falsely states that "The Company is unable to predict when any changes in accounting practices applicable to the Company's business will be made, or what effect, if any, such changes will have on the Company's financial statements," and that ". . . it is the Company's opinion that the accounting practices currently followed by it present fairly the Company's financial conditions and the results of its operations and that no material changes in the Company's accounting practices are warranted."

(d) The defendants failed to disclose to the plaintiffs and the members of the class what the results of Punta Gorda's operations for the period beginning 1967 through 1971 and for the first three months period of 1972 would have been on a pro forma basis following Punta Gorda's adherence to the new accounting rules and guidelines applicable to its operating statement. The following chart sets forth the earnings of Punta Gorda for the years 1967 through 1971 as set forth in the Prospectus and the earnings for the same period, as restated approximately six months thereafter, under the contemplated revised accounting rules and guidelines:

Year	Net Income Shown in Prospectus	Restated
1968	$ 407,918 ($.28 per share)	$ 179,831 ($.12 per share)
1969	$1,037,385 ($.66 per share)	$ 312,733 ($.20 per share)
1970	$1,581,564 ($.86 per share)	$ 541,864 ($.29 per share)
1971	$3,360,855 ($1.72 per share)	$1,968,696 ($1.06 per share)

(e) The defendants failed to openly disclose that Punta Gorda operates at a loss for federal income tax purposes, and that its earnings are based entirely on anticipated receipts from the installment contracts, and in this connection the Prospectus fails to include in the statements of income a comparative presentation of Punta Gorda's reduced income and reduced income per share as a result of the accounting principles used for its federal income tax returns, which do not give recognition to income from the installment contracts until cash is actually received. Instead, the defendants, in a false and misleading way, provided a table showing a difference between "Financial Statement Basis Over Income Tax Basis," showing, for example, differences in 1971 in the magnitude of $3,418,-256.00 and a difference per share of $1.83 without stating that earnings are lower by such amounts than those shown on the statements of income preceding, utilizing the term "difference" to conceal the fact of "over-statement" of earnings as a result of accrual of installment sales as income when made;

(f) The statement of income contained in the Prospectus contains a presentation of the ratio of earnings to fixed charges prior to the offering, showing a ratio of earnings which were 8.33 times fixed charges in the year 1971, with a pro forma earnings ratio to fixed charges after the offering of 4.05 for such year. Both of these ratios, which tend to indicate substantial coverage for future fixed charges of Punta Gorda, are false and misleading because they are not based on actual cash flow available for payment of fixed charges, but are based principally upon book earnings resulting from installment sale contracts, where the cash flow is inadequate to yield anywhere near the coverage of fixed charges represented, and where the risk of default flowing from any inability of Punta Gorda to perform its obligations under the sale contract is real and substantial;

(g) The defendants failed and omitted to state that Punta Gorda is and will continue to be materially adversely affected by

recent ecological regulations in the State of Florida preventing future development of homesites with either saltwater or fresh water frontage, stating that ". . . the Company has shifted its emphasis to projects in which homesites will be located on parkways or freshwater lakes and creeks," and that "the Company will be dependent in its ability to develop such properties upon the obtaining of requisite regulatory approvals and complying with applicable laws and regulations." In fact, laws enacted, as enforced on the effective date of the Prospectus, tend to indicate that such approvals will be extremely difficult, if not impossible, to obtain, and that the State of Florida, in order to preserve the ecology of its "wet areas" intends to prevent the form of land development involving dredging and cutting of canals and waterways heretofore engaged in by Punta Gorda. As of the writing of this Complaint, Punta Gorda is virtually at a standstill in obtaining additional properties with water frontage, for development, and its cash flow, earnings and consequent ability to comply with its obligations under prior buy-and-sell contracts are being materially and possibly irreparably, adversely affected. As a result of the crippling effect of such ecological regulation upon future sales, and cash flow, the ability of Punta Gorda to meet its fixed obligations to existing creditors and prior purchasers of homesites is in severe jeopardy, and no disclosure of this material risk is contained in the Prospectus;

(h) In addition to the restrictive effect of the foregoing regulations on future development and sale of land with water frontage, Punta Gorda's ability to sell any lots will be impaired, because of the difficulty involved and lower price of lots without water frontage and the increased costs of such sales in commissions and other expenses, all of which will have a further material adverse effect upon Punta Gorda's cash flow and income;

(i) The defendants falsely represented that Punta Gorda had not knowingly made any untrue statement of a material fact or omitted to state any material fact required to be stated in the

Registration Statement, including the Prospectus, or necessary to make the statements therein not misleading;

25. In connection with and in furtherance of the scheme to defraud, as aforesaid, the defendants engaged in acts and conduct which they combined and agreed to do and each of the defendants aided and abetted, acquiesced, encouraged, cooperated and or assisted in the effectuation of such combination and conspiracy;

26. By reason of the foregoing acts and conduct, plaintiffs and the members of the class herein purchased $15,000,000.00 worth of Punta Gorda debentures and 171,570 shares of Punta Gorda's common stock at $18.00 per share in the public offering of May 2, 1972. By reason of said acts and conduct, plaintiffs and the members of the class paid an excessive and inflated price for the said debentures and common stock which they so purchased. Recently the common stock of Punta Gorda has been trading on the American Stock Exchange at prices in the vicinity of $8.00 per share and the debentures have been trading on the American Bond Exchange at prices in the area of $600.00 per debenture. Plaintiffs on or about October 6, 1972, sold their said 100 shares of Punta Gorda's common stock at a price of $8.00 per share, and thus, sustained a loss of more than $1,000.00 with respect thereto. On or about the same date plaintiffs sold their five debentures, which cost them $5,000.00, for $3,375.00, thus sustaining a loss of approximately $1600.00;

27. That by reason of the aforesaid, the plaintiffs and all the members of the class have been damaged in amounts, which although easily ascertainable, are presently undetermined;

Wherefore, plaintiffs demand:

A. Judgment against all of the defendants, jointly and severally, and in favor of plaintiffs and each member of the class for damages in the amount determined to have been sustained by

plaintiffs and each member of the class, together with interest and costs of suit, including a reasonable attorney's fee, and

B. Such other and further relief as may be necessary and appropriate.

COUNT II

Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5

28. Paragraphs 1 through 27 of Count I of this Complaint are realleged and incorporated herein by reference as though fully set forth;

29. Count II of this action is brought under and pursuant to Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder;

30. In connection with the Registration Statement referred to above, including the Prospectus contained therein, defendants engaged in an unlawful combination and in conduct pursuant to which they, *inter alia*, engaged in other acts, transactions, practices and courses of business which operated as a fraud and deceit upon plaintiffs and each member of the class, and made various untrue statements of material facts and omitted to state material facts necessary to make the statements made not misleading to plaintiffs and the members of the class, all in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. The fraudulent practices and devices, utilized by the defendants in connection with and in order to effectuate the aforesaid, consisted of knowingly making false representations and intentional concealment of and failure to disclose material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiffs and members of the class;

31. All defendants have encouraged, cooperated, aided and abetted, acquiesced, assisted and participated in the preparation

of and issuance of a Registration Statement, including a Prospectus, and the sale of shares and debentures pursuant to such Registration Statement. As a result, defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that they employed devices, schemes and artifices to defraud, obtain money and property by means of untrue statements of material facts, and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon purchasers with respect to the allegations more specifically set forth in paragraph 24 of Count I of this Complaint, which are incorporated herein by reference;

32. The individual defendants were at all times material to the Complaint controlling persons of Punta Gorda within the meaning of Section 20(a) of the Exchange Act.

Wherefore, in Count II of this Complaint plaintiffs demand:

A. Judgment against each defendant, jointly and severally, and in favor of plaintiffs and each member of the class for damages in the amount determined to have been sustained by plaintiffs and each member of the class, together with interest and costs of suit, including a reasonable atttorney's fee, and

B. Such other and further relief as may be necessary and appropriate.

ANDERSON, GREEN, FORTUS & LANDER
By MARTIN M. GREEN
Attorneys for Plaintiffs
Suite 938, Chromalloy Plaza
120 South Central
Clayton, Missouri 63105
862-6800

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ANSWER TO FIRST AMENDED COMPLAINT OF DEFENDANT COOPERS & LYBRAND

(Filed October 10, 1973)

Comes now defendant Coopers & Lybrand and for its Answer to Plaintiffs' First Amended Complaint states to the Court as follows:

1. For answer to paragraph 1, this defendant admits that plaintiffs seek to invoke the subject matter jurisdiction of this Court pursuant to the statutes cited in such paragraph 1.

2. For answer to paragraph 2, this defendant admits that plaintiffs seek to impose liability against it pursuant to the statutes and Rule cited in such paragraph 2.

3. For answer to paragraphs 3 and 4, this defendant denies each and every allegation contained therein.

4. For answer to paragraph 5, this defendant admits that a public offering of Punta Gorda common stock and 6% Convertible Subordinated Debentures, due 1992 (the "debentures") was made by certain underwriters pursuant to a Prospectus with an effective registration date with the Securities and Exchange Commission of May 2, 1972. Except as so expressly admitted, this defendant denies each and every allegation contained in such paragraph 5.

5. For answer to paragraph 6, this defendant admits that defendant Punta Gorda Isles, Inc. ("Punta Gorda") is a corporation duly organized and existing under the laws of the State of Florida and maintains its executive offices at 1625 West Marion Avenue, Punta Gorda, Florida. Except as so expressly admitted, this defendant is without sufficient knowledge or information to answer the remaining allegations of such paragraph 6 and, therefore, denies same.

6. For answer to paragraph 7, this defendant admits that it was formerly known as Lybrand, Ross Bros & Montgomery, that it is a partnership, that it is a national accounting firm with offices in major cities throughout the United States and maintains an office at 411 North 7th Street, St. Louis, Missouri, that from time to time it has provided accounting services to defendant Punta Gorda, that from time to time it has been auditor for defendant Punta Gorda and has certified certain of its financial statements, and that it examined the balance sheet of Punta Gorda as of December 31, 1971 and the related statements of stockholders' equity and income for the five years then ended, and the statement of changes in financial position for the three years then ended, all of which are contained in the Prospectus for the May 2, 1972 offering of common stock and debentures, and certified in the Prospectus for such offering that such balance sheet and statements presented "fairly the financial position of Punta Gorda Isles, Inc. at December 31, 1971, and the results of its operations for the five years then ended, and changes in financial position for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis." Except as so expressly admitted, this defendant denies each and every allegation contained in such paragraph 7.

7. For answer to paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, this defendant is without sufficient knowledge or information to answer the allegations in such paragraphs and, therefore, denies same.

8. For answer to paragraphs 18, 19, 20, 21, 22 and 23, this defendant denies each and every allegation contained therein.

9. For answer to the first paragraph and clauses (a) and (b) of paragraph 24, this defendant denies each and every allegation contained therein.

10. For answer to clause (c) of paragraph 24, this defendant admits that the Prospectus contains the following statement:

> "The Company is unable to predict whether any changes in accounting practices applicable to the Company's business will be made or what effect, if any, such changes will have on the Company's financial statements. However, it is the Company's opinion that the accounting practices currently followed by it present fairly the Company's financial condition and the results of its operations and that no material changes in the Company's accounting practices are warranted."

Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (c).

11. For answer to clause (d) of paragraph 24, this defendant admits that the earnings figures for the years 1968, 1969, 1970 and 1971 quoted in such clause do appear in the Prospectus, and the earnings per share figures recited in such clause do appear in such Prospectus as "fully diluted net income per share." Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (d).

12. For answer to clause (e) of paragraph 24, this defendant admits that the Prospectus contains a table comparing the results for the accrual method of accounting for financial reporting with the accounting used for Federal income tax purposes, that such table shows for the year 1971 a difference of financial statement basis earnings over income tax basis earnings of $3,418,256 and a difference in earnings per share for such year of $1.83. Except as so expressly admitted, this defendant denies each and every allegation contained in said clause (e).

13. For answer to clause (f) of paragraph 24, this defendant admits that the Prospectus contains a presentation captioned ratio of earnings to fixed charges of 8.33 for the year 1971, with a pro forma ratio of earnings to fixed charges of 4.05 for 1971. Except as so expressly admitted, this defendant denies each and every allegation contained in said clause (f).

14. For answer to clause (g) of paragraph 24, this defendant admits that the following statement is contained in the Prospectus:

> "Management of the Company believes that compliance with the above statutory requirements and agency regulations related to environmental quality may materially affect the ability of the Company as well as other land developers to develop an additional inventory of homesites with frontage on salt water bodies. As a result, the Company has shifted its emphasis to projects in which homesites will be located on parkways or fresh water lakes and creeks. Such projects are also subject to the above laws, regulations and regulatory agencies and, to the extent that dredging is required, fill is needed or sewage disposal facilities are required to be constructed, the Company will be dependent in its ability to develop such properties upon the obtaining of requisite regulatory approvals and complying with applicable laws and regulations."

Except as so expressly admitted, this defendant denies each and every allegation contained in such clause (g).

15. For answer to clause (h) of paragraph 24, this defendant is without sufficient knowledge or information to answer the allegations contained therein and, therefore, denies same.

16. For answer to clause (i) of paragraph 24, this defendant denies the allegations contained in such clause.

17. For answer to paragraph 25, this defendant denies each and every allegation contained in such paragraph.

18. For answer to paragraph 26, this defendant is without sufficient knowledge or information to answer the allegations therein and, therefore, denies same.

19. For answer to paragraph 27, this defendant denies each and every allegation contained in such paragraph.

20. For further answer to Count I, this defendant states that such Count fails to state any cause of action upon which relief can be granted against it.

21. For further answer to Count I, this defendant states that as regards any part of the Prospectus or the Registration Statement of May 2, 1972 purporting to be made upon its authority as an expert, it had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the Prospectus and Registration Statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements not misleading.

22. For further answer to Count I, this defendant states that the damages, if any, suffered by the plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Prospectus or Registration Statement, with respect to which this defendant's liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading. There were no such untruths or omissions in the Prospectus or Registration Statement.

23. For further answer to Count I, this defendant states that plaintiffs failed to commence their action within one year after the discovery of the alleged untrue statements or omissions, or after such discovery should have been made by the exercise of reasonable diligence.

24. For answer to paragraph 28, this defendant admits and denies in the same manner as it admitted and denied the allegations contained in paragraphs 1 through 27 of Count I, which paragraphs are realleged and incorporated by reference into such paragraph 28.

25. For answer to paragraph 29, this defendant admits that plaintiffs seek to assert a cause of action under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10(b)-5 promulgated thereunder.

26. For answer to paragraphs 30 and 31, this defendant denies each and every allegation contained in such paragraphs.

27. For answer to paragraph 32, this defendant is without sufficient knowledge or information to answer the allegations contained therein and, therefore, denies same.

28. For further answer to Count II, this defendant states that such Count fails to state a claim upon which relief can be granted against it.

Wherefore, having fully answered, this defendant prays that it be dismissed with its costs.

BRYAN, CAVE, McPHEETERS &
McROBERTS
By VERYL L. RIDDLE
CHARLES G. SIEBERT
JOHN J. HENNELLY
500 North Broadway
St. Louis, Missouri 63102
231-8600
Attorneys for Defendant
Coopers & Lybrand

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

ANSWER
Of Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas to Plaintiffs' First Amended Complaint.

(Filed October 9, 1973)

Come now the Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, and for their answer to Plaintiffs' First Amended Complaint state as follows:

COUNT I

1. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' First Amended Complaint.

2. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' First Amended Complaint.

3. These Defendants admit that portions of the Prospectus of Punta Gorda Isles, Inc., dated May 2, 1972 ("Prospectus"), were prepared in the Eastern District of Missouri, that some of the Prospectuses were distributed in the Eastern District of

Missouri, that some of the securities offered by the Prospectuses were sold in the Eastern District of Missouri, and that these Defendants aided, participated, or acquiesced in the preparation of those Prospectuses; the Defendants deny all other allegations contained in Paragraph 3 of the Plaintiffs' First Amended Complaint.

4. These Defendants admit that the means and instrumentalities of interstate commerce and the mails were used in connection with the public offering of the securities of Punta Gorda Isles, Inc., in May 1972; these Defendants deny all allegations contained in Paragraph 4 of the Plaintiffs' First Amended Complaint.

5. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

6. These Defendants do not know what is meant by "typical" in Paragraph 6 of Plaintiffs' First Amended Complaint, and therefore are without knowledge or information sufficient to form a belief as to the truth of the allegation that "In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period"; these Defendants admit the other allegations contained in Paragraph 6 of the Plaintiffs' First Amended Complaint.

7. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 7 of Plaintiffs' First Amended Complaint.

8. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 8 of Plaintiffs' First Amended Complaint.

9. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 9 of Plaintiffs' First Amended Complaint.

10. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

11. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 11 of Plaintiffs' First Amended Complaint.

12. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 12 of Plaintiffs' First Amended Complaint.

13. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 13 of Plaintiffs' First Amended Complaint.

14. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 14 of Plaintiffs' Amended Complaint.

15. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 15 of Plaintiffs' First Amended Complaint.

16. These Defendants deny that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. These Defendants admit the other allegations contained in Paragraph 16 of Plaintiffs' First Amended Complaint.

17. These Defendants admit that pursuant to a Registration Statement which was declared effective by the Securities and Exchange Commission ("SEC") on May 2, 1972, $15,000,000 in principal amount of Punta Gorda Isles, Inc., Debentures and 171,570 shares of Punta Gorda Isles, Inc., Common Stock at a price of $18 per share were offered to the public. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 17 of Plaintiffs' First Amended Complaint.

18. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of Plaintiffs' First Amended Complaint.

19. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' First Amended Complaint.

20. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of Plaintffs' First Amended Complaint.

21. These Defendants deny all the allegations contained in Paragraph 21 of Plaintiffs' First Amended Complaint.

22. These Defendants deny all the allegations contained in Paragraph 22 of Plaintiffs' First Amended Complaint.

23. These Defendants admit that the Registration Statement became effective with the SEC on or about May 2, 1972, and these Defendants deny all other allegations contained in Paragraph 23 of Plaintiffs' First Amended Complaint.

24. These Defendants deny all the allegations contained in Paragraph 24 of Plaintiffs' First Amended Complaint.

25. These Defendants deny all the allegations contained in Paragraph 25 of Plaintiffs' First Amended Complaint.

26. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint that the Plaintiffs purchased and sold the Punta Gorda Isles, Inc., Debentures and Common Stock. These Defendants admit that $15,000,000 in principal amount of Punta Gorda Isles, Inc., Debentures and 171,570 shares of Punta Gorda Isles, Inc., Common Stock were offered to the public in the offering of May 2, 1972. These Defendants deny all other allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint.

27. These Defendants deny all the allegations contained in Paragraph 27 of Plaintiffs' First Amended Complaint.

COUNT II

28. For their answer to Paragraph 28, the Defendants incorporate herein by reference the responses contained in Paragraphs 1-27 of this Answer as fully as though said responses were set forth in full herein.

29. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' First Amended Complaint.

30. These Defendants deny the allegations contained in Paragraph 30 of Plaintiffs' First Amended Complaint.

31. These Defendants deny the allegations contained in Paragraph 31 of Plaintiffs' First Amended Complaint.

32. These Defendants deny the allegations contained in Paragraph 32 of Plaintiffs' First Amended Complaint.

Further answering, these Defendants allege as follows:

First Defense

33. A copy of the Prospectus dated May 2, 1972, is attached to this Answer as Exhibit "A" and by reference is fully incorporated herein. A copy of Punta Gorda Isles, Inc.'s, 1972 Annual Report is attached to this Answer as Exhibit "B" and by reference is fully incorporated herein. The changes in Punta Gorda Isles, Inc.'s, accounting procedures are described on Pages 3, 18 and 19 of the 1972 Annual Report. For the reasons there stated, the differences between the income reported in the Prospectus and the income reported in the 1972 Annual Report result solely from a difference in the method of reporting and do not reflect any inaccuracy in the income figures in the Prospectus. The Prospectus contains no misstatements of material facts nor does it fail to state any facts necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

Second Defense

34. These Defendants did not and do not know of any untrue statements of material facts made in connection with the sale of securities issued by Defendant Punta Gorda Isles, Inc., nor or of any omissions to state material facts necessary to make the statements, in the light of the circumstances under which they were made, not misleading. The exercise of reasonable care did not disclose and would not have disclosed any such untruth or omission, and, in fact, there were no untruths or omissions.

Third Defense

35. The Plaintiffs did not purchase any securities from these Defendants.

Fourth Defense

36. The damages, if any, suffered by the Plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Registration Statement, with respect to which they assert the liability of Defendants, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading. There were no such untruths or omissions in the Registration Statement.

Fifth Defense

37. The damages, if any, suffered by the Plaintiffs were not caused by any misstatements of material facts in the Registration Statement nor by any failure to state any material facts required to be stated therein or necessary to make the statements therein not misleading.

Sixth Defense

38. The statements and reports in the Prospectus dealing with accounting matters were made on the authority of Defendant Coopers & Lybrand as experts on such matters; as regards those statements and reports, these Defendants had no reasonable ground to believe and did not believe, at the time the Registration Statement became effective, that any of those statements or reports were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make those statements and reports not misleading.

Seventh Defense

39. As regards those parts of the Prospectus not purporting to be made on the authority of Defendant Coopers & Lybrand as experts on accounting matters, these Defendants had, after reasonable investigation, reasonable ground to believe and did believe, at the time the Registration Statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Eighth Defense

40. These Defendants at all times mentioned in the Plaintiffs' First Amended Complaint acted in good faith and did not directly or indirectly induce any violation of the Securities Exchange Act of 1934 or any of the regulations promulgated thereunder, and no such violations occurred.

Wherefore, having fully answered the Plaintiffs' First Amended Complaint, Defendants Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas pray that Plaintiffs take nothing on their First Amended Complaint, that this action be dismissed on the merits, and that these Defendants recover their costs herein, including reasonable attorneys' fees.

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
By WILLIAM A. RICHTER
Attorneys for Defendants, Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas
720 Olive Street
Twenty-Fourth Floor
St. Louis, Missouri 63101
(314) 421-3850

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ANSWER
Of Defendant Punta Gorda Isles, Inc., to Plaintiffs' First Amended Complaint

(Filed October 9, 1973)

Comes now the Defendant Punta Gorda Isles, Inc., and for its answer to Plaintiffs' First Amended Complaint states as follows:

COUNT I

1. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' First Amended Complaint.

2. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' First Amended Complaint.

3. The Defendant admits that portions of the Defendant's Prospectus dated May 2, 1972 ("Prospectus"), were prepared in the Eastern District of Missouri, that some of the Prospectuses were distributed in the Eastern District of Missouri, that some of the securities offered by the Prospectuses were sold in the Eastern District of Missouri, and that the Defendant aided and participated in the preparation of those Prospectuses; the Defendant denies all other allegations contained in Paragraph 3 of the Plaintiffs' First Amended Complaint.

4. The Defendant admits that the means and instrumentalities of interstate commerce and the mails were used in connection with the public offering of its securities in May 1972; the Defendant denies all other allegations contained in Paragraph 4 of the Plaintiffs' First Amended Complaint.

5. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

6. The Defendant does not know what is meant by "typical" in Paragraph 6 of Plaintiffs' First Amended Complaint, and therefore is without knowledge or information sufficient to form a belief as to the truth of the allegation that "In a typical transaction, the customer pays 5-10% down on the purchase price of a homesite, and then pays the balance in installments over a ten year period"; the Defendant admits the other allegations contained in Paragraph 6 of the Plaintiffs' First Amended Complaint.

7. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 7 of Plaintiffs' First Amended Complaint.

8. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 8 of Plaintiffs' First Amended Complaint.

9. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 9 of Plaintiffs' First Amended Complaint.

10. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The De-

fendant admits the other allegations contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

11. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 11 of Plaintiffs' First Amended Complaint.

12. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 12 of Plaintiffs' First Amended Complaint.

13. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 13 of Plaintiffs' First Amended Complaint.

14. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 14 of Plaintiffs' First Amended Complaint.

15. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 15 of Plaintiffs' First Amended Complaint.

16. The Defendant denies that the wrongs alleged in the Plaintiffs' First Amended Complaint ever occurred. The Defendant admits the other allegations contained in Paragraph 16 of Plaintiffs' First Amended Complaint.

17. The Defendant admits that pursuant to a Registration Statement which was declared effective by the Securities and Exchange Commission ("SEC") on May 2, 1972, $15,000,000 in principal amount of its Debentures and 171,570 shares of its Common Stock at a price of $18 per share were offered to the

public. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 17 of Plaintiffs' First Amended Complaint.

18. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of Plaintiffs' First Amended Complaint.

19. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' First Amended Complaint.

20. The Defendant is without knowedge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of Plaintiffs' First Amended Complaint.

21. The Defendant denies all the allegations contained in Paragraph 21 of Plaintiffs' First Amended Complaint.

22. The Defendant denies all the allegations contained in Paragraph 22 of Plaintiffs' First Amended Complaint.

23. The Defendant admits that the Registration Statement became effective with the SEC on or about May 2, 1972, and the Defendant denies all other allegations contained in Paragraph 23 of Plaintiffs' First Amended Complaint.

24. The Defendant denies all the allegations contained in Paragraph 24 of Plaintiffs' First Amended Complaint.

25. The Defendant denies all the allegations contained in Paragraph 25 of Plaintiffs' First Amended Complaint.

26. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint that the Plaintiffs purchased and sold the Defendant's Debentures and Common Stock. The Defendant admits that $15,000,000

in principal amount of its Debentures and 171,570 shares of its Common Stock were offered to the public in the offering of May 2, 1972. The Defendant denies all other allegations contained in Paragraph 26 of Plaintiffs' First Amended Complaint.

27. The Defendant denies all the allegations contained in Paragraph 27 of Plaintiffs' First Amended Complaint.

COUNT II

28. For its answer to Paragraph 28, the Defendant incorporates herein by reference the responses contained in Paragraphs 1-27 of this Answer as fully as though said responses were set forth in full herein.

29. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' First Amended Complaint.

30. The Defendant denies the allegations contained in Paragraph 30 of Plaintiffs' First Amended Complaint.

31. The Defendant denes the allegations contained in Paragraph 31 of Plaintiffs' First Amended Complaint.

32. The Defendant denies the allegations contained in Paragraph 32 of Plaintiffs' First Amended Complaint.

Further answering, the Defendant alleges as follows:

First Defense

33. A copy of the Prospectus dated May 2, 1972, is attached to this Answer as Exhibit "A" and by reference is fully incorporated herein. A copy of the Defendant's 1972 Annual Report is attached to this Answer as Exhibit "B" and by reference is fully incorporated herein. The changes in the Defendant's ac-

counting procedures are described on Pages 3, 18 and 19 of the 1972 Annual Report. For the reasons there stated, the differences between the income reported in the Prospectus and the income reported in the 1972 Annual Report result solely from a difference in the method of reporting and do not reflect any inaccuracy in the income figures in the Prospectus. The Prospectus contains no misstatements of material facts nor does it fail to state any facts necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

Second Defense

34. The Defendant did not know, and in the exercise of reasonable care could not have known, of any untrue statements of material facts, or of any omissions to state material facts necessary to make the statements, in the light of the circumstances under which they were made, not misleading.

Third Defense

35. The Plaintiffs did not purchase any securities from the Defendant.

Fourth Defense

36. The damages, if any, suffered by the Plaintiffs represent other than the depreciation in value of their securities resulting from those parts of the Registration Statement, with respect to which they assert the liability of Defendant, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Fifth Defense

37. The damages, if any, suffered by the Plaintiffs were not caused by any misstatements of material facts in the Registra-

tion Statement nor by any failure to state any material facts required to be stated therein or necessary to make the statements therein not misleading.

Wherefore, having fully answered the Plaintiffs' First Amended Complaint, Defendant Punta Gorda Isles, Inc., prays that Plaintiffs take nothing on their First Amended Complaint, that this action be dismissed on the merits, and that this Defendant recover its costs herein, including reasonable attorneys' fees.

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
By WILLIAM A. RICHTER
Attorneys for Defendant Punta Gorda Isles, Inc.
720 Olive Street
Twenty-Fourth Floor
St. Louis, Missouri 63101
(314) 421-3850

(Certificate of service omitted in printing)

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[2] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEPOSITION OF CECIL LIVESAY
Taken on the 19th day of April, A.D., 1974

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[3] **Direct Examination**

By Mr. Richter:

Q. Would you state your name, please? A. Cecil Livesay.

Q. And where do you live, Mr. Livesay? A. 955 Glen Way. In Glendale, Missouri.

Q. And what is your occupation? A. Police Chief.

Q. And in what City? A. The City of Glendale.

Q. And are you the Cecil Livesay who is one of the Plaintiffs in the case of Cecil and Dorothy Livesay versus Punta Gorda Isles, Etc., et al? A. I am.

Q. How long have you been the Chief of Police in Glendale? A. I am in my fifth year being Chief.

Q. How long have you been on the Glendale Police Force? A. Eighteen years.

Q. How old a man are you? **[4]** I am forty.

Q. How long have you been in police work? A. Eighteen years.

Q. And you started with Glendale? A. I did.

Q. The Glendale Police Department? A. I did.

Q. Had you had any employment prior to being a policeman? A. Yes, sir.

Q. And what was your prior employment? A. I was working at Brown Shoe Company.

Q. What is your highest degree of formal education? A. One semester of college.

Q. And you have had courses, I take it, in police work? A. I have.

Q. Chief, I am going to ask you questions during the course of this deposition, and I would assume from your work as a police officer you had occasion to testify in Court from time to time and you are familiar how these examinations go, generally? A. It's all been criminal, but, yes, sir.

Q. If at any time I ask you something that you don't understand or you need clarification, just say so and we will proceed from that. A. Thank you.

[5] Q. I might say because of the nature of this suit that we are going to get into some personal information which is because of the type of case that you brought here, and we are not meaning to pry, but it is information we are entitled to inquire into. A. I understand.

Q. And first of all then, let's start out with asking you what your annual income is as Chief of Police? A. Fourteen five, fifteen thousand, something around there. Between fourteen and fifteen.

Q. And what was your income, approximately, in 1972? A. Between twenty-three and—in '72? Twenty-one, twenty-one thousand.

Q. Do you have another source of income other than your pay as Chief of Police? A. And my wife's salary.

Q. Okay. That twenty odd some thousand you gave me for '72 was a combined income of you and your wife; is that correct? A. Yes, sir, that's correct.

Q. And what was your income in '72? A. Thirteen thousand.

Q. And what is your wife's current income? A. Her current income, ninety-five hundred, nine thousand.

Q. And the figures that you have given me for your income **[6]** and your wife's, are those your gross before your various deductions? A. Yes, sir, it is.

Q. What training courses have you gone through as a police officer in the last five years, let's say? A. Well, I had a management course, short seminars, and I think I went to the Major Case Squad Training, and that would be in the last five years, that would be it.

Q. What high school did you graduate from? A. Beaumont.

Q. What university did you attend for a semester? A. Washington U.

Q. Here in St. Louis? A. Yes, sir.

Q. In your complaint you alleged that in May of 1972, you purchased some securities of Punta Gorda Isles, Inc. Had you purchased any corporate securities at any time prior to purchasing the securities of Punta Gorda Isles, Inc., as alleged in your complaint? A. Yes, sir, I have.

Q. When was the first time, to the best of your recollection, that you purchased any corporate securities? A. 1961.

Q. And what fixes that date in your mind? A. I just remember when I got—when I became interested in securities was 1961. And I attended an investment **[7]** seminar, and it was '61.

Q. Who conducted that seminar? A. The first one I attended was a one-day seminar given by the Globe-Democrat.

Q. And did you shortly thereafter purchase corporate securities? A. I did.

Q. And have you continued to buy and sell securities since 1961? A. Yes, sir.

Q. Have you kept any records over the years of the securities which you have bought and sold? A. If I would go back on my income taxes, I am sure I would have it. I don't know how long I retain them, but, yes, I would probably have a record of everything.

Q. Do you have any independent recollection of approximately how many securities you purchased since 1961? A. This would be a guess, but since 1961, I would say between seventy-five and one hundred.

Q. And do you have any approximation of how many of those you sold, how many securities you have sold since that time? A. I probably sold all of them but six or eight of them.

Q. In 1972, what was the approximate amount you had in investments in corporate securities? **[8]** A. $30,000.00.

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[12] Q. I believe you testified that you owned how many stocks currently? A. Eight.

Q. And what is the stock value currently of your investment portfolio? **[13]** A. $40,000.00.

Q. And I said stock. Do you own any other corporate securities other than stocks? A. Debentures.

Q. Do you include that in the forty thousand? A. I do.

Q. Do you have any idea what the approximate value of your bonds or debentures are as compared to your stocks? A. Ten thousand in debentures.

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[69] Q. Do you have any written agreement with Mr. Green concerning his representation of you in this case? **[70]** A. Written agreements, no, sir.

Q. Do you have any written agreement pertaining to his fees in connection with this case? A. No, sir.

Q. Do you have any oral agreement with Mr. Green concerning his representation of you in this case? A. An oral agreement?

Q. Right. A. Yes.

Q. Do you have any oral agreement with him concerning payment of fees and expenses in connection with this case? A. Yes, sir, I do.

Q. Now has Mr. Green given you any writing, not in the form of an agreement, but such as a letter signed by him relating to his representation or fees in this case? A. His fees?

Q. Yes. Or his expenses. A. No.

Q. Have you given him anything in writing concerning those subjects? A. No.

Mr. Green: Off the record.

[Whereupon there was an off the record discussion.]

Mr. Richter: For the record: You are allowing your client to answer questions with respect to your arrangements in fees and arrangements on representation, and it will not **[71]** constitute a waiver on any attorney-client privilege that you might have. Now John, is that agreeable with you?

Mr. Hennelly: Of course.

Q. (Mr. Richter) Chief, you said that you had an oral agreement with Mr. Green concerning his representation of you in this case and concerning payment of fees and expenses in this case, am I correctly stating what you testified to previously? A. You are.

Q. Now first of all: Let me ask you what the agreement is with respect to representation. Is there anything beyond the fact that he would represent you in this case and that you would bring these suits as the appointed representatives of a class? A. Of a——

Q. Let me ask you what your understanding is, your agreement with Mr. Green concerning his representation of you and your wife in this case. In other words, the question of fees and expenses at this point. A. All right. That he would represent me and the other class holders, and that he explained that it would be a class action suit, and that he would represent me and the other class holders.

Q. And do you have any other agreement concerning his representation? **[72]** A. No.

Q. And do you have any agreement concerning his representation of you and your wife as individuals in the event for some reason this should not be a class action? A. No.

Q. Now what is your agreement with him concerning payment of fees? A. Well, the fee—he said that he could not determine that, that I would have to pay the court costs, and that there would be some expenses involved, and again he said that he could not determine what the expenses would be, but he would have to take some trips, and it could be rather expensive.

Q. Do you have any agreement with him as to the maximum amount of expenses you will pay in this case? A. No.

Q. Have you agreed with him to pay the expenses regardless of what they might be? A. I have.

Q. And you have lost, if I have your figures correctly, approximately $2,443.29 on this transaction, do these figures sound substantially right? A. Yes.

Q. And did Mr. Green in his discussions with you explain that your expenses of this case could be substantially in excess of that amount? **[73]** A. Yes, sir. And he further stated that the court could award me these expenses back.

Q. Have you agreed with him to pay the expenses incurred in prosecuting this action even if it is not a class action? Have you made any agreement as to what would happen if it is not a class action? A. No, none.

Q. Have you made any agreement with him concerning the payment of a fee to him? A. No. He said he could not determine how many hours would be spent and what all would be involved. There hasn't been an agreement on what the fee would be.

Q. Have you agreed to pay him a fee at all? A. I said I would pay him his fee.

Q. Have you agreed to pay him a fee regardless of the outcome of the lawsuit? A. Yes, I have.

Q. Have you agreed to any basis on which you would pay him a fee? A. Is that the end of the question?

Q. Yes. A. I'm sorry, would you repeat it?

Q. Have you agreed to any basis for the fee? A. No.

Q. You have no agreement on whether the fee is to be based **[74]** on the amount of time he spends? A. Oh, he said that he wouldn't be able to tell me the exact fee.

Q. Did you agree on a rate you would pay him for his time? A. No.

Q. Did you agree that he would be paid on the basis of a percent of any recovery of this? A. No.

Q. You just agreed to pay him a fee? A. Yes.

Q. Is it your understanding you would pay him whatever he would charge you? A. Well, if he—I might argue about it if it was too high. Something unreasonable, but I said I would pay his fee to represent me.

Q. And you also have agreed to pay the expenses whatever they might be? A. I have.

Q. What if the expenses were say $25,000.00, what is your understanding? Would you be obligated to pay him? A. If the court would not, we agreed to pay him.

Q. If it were $10,000.00, you would pay him that? A. Yes.

Q. And in addition you agreed to pay him a fee? A. I have.

[75] Q. Have you made any agreement with him for the payment of a fee if this was not a class action? A. No.

Q. Your agreement has nothing to do with whether or not this is a class action; is that correct? A. No.

Q. You just agreed to pay him whatever he charges you; is that right, for a fee? A. Well, when I retained him he explained what might be involved. And I said I would be willing to pay the expenses and his fee plus court costs.

Q. And you made that agreement regardless of the outcome of the case? A. I did.

Q. And is it your understanding that you will be obligated to pay Mr. Green a fee if you lose this case? A. Yes, it is my understanding.

Q. And whatever fee he might charge is what you would be obligated to pay? A. Yes, it would be my obligation.

Q. But he has not agreed to charge any particular amount; is that correct? A. No, he has not.

Q. Has he told you that he won't charge you any fee if you didn't recover anything? **[76]** A. No, he didn't tell me that.

Q. Did he say that you would not have to pay a fee if the fee was not recovered from the Defendants? A. No, he didn't tell me that.

Q. Have you advanced any expenses to this point in the litigation? A. No.

Q. Have you paid for filing fees of this case? A. No.

Q. Have you received any bills for any costs? A. No, I haven't.

Q. Would you pay a bill for $18,000.00 for expenses if Mr. Green presented you with one after this case was over and you did not recover anything? A. Well, I would have to see that it was a truthful bill, but, yes, I would have to pay it. My arrangement was to pay the expenses, his fee and the court costs.

Q. Has Mr. Green told you that you would receive anything out of this case other than a maximum of some twenty-four hundred dollars, which you claim to have lost on the stock? A. Well, it's twenty-six hundred.

Q. Excuse me. A. And it is—well, twenty-five, whatever it is.

[77] Q. Approximately twenty-five hundred dollars. Can we use that for talking? A. Yes, sir. He said that I could recover

my loss and that the court could award me the expenses involved in pursuing the case.

Q. But, of course, that would be money that would go to reimbursing Mr. Green for expenses incurred in pursuing the case, was that your understanding? A. Right.

Q. So you couldn't stand to gain any more in a round number of twenty-five hundred dollars, which you lost, plus perhaps interest. A. That's true.

Q. Is that what he told you? A. That's what he told me.

Q. And you agreed, with that understanding, to pay him whatever the expenses are in prosecuting the action regardless of the outcome? A. I have.

Q. And you also agreed to pay him whatever he might charge you regardless of the outcome of the action? A. I have.

Q. However you said that if you felt that his fee was too high, you would argue with him about that; is that correct? **[78]** A. Well, you know, when you mention $25,000.00, I would want——

Mr. Green: He is talking about expenses on twenty-five thousand.

Q. (By Mr. Richter) Well, would you argue with him about the fee if you felt the fee was too high? A. No, I am sure Mr. Green would be fair in the fee he presents me, and the expenses.

Q. As I understand your agreement, you would pay him expenses no matter what they were? A. That's true.

Q. But if he presented you a bill for $25,000.00 for a fee, would you argue with him about that? A. Would I be happy with him?

Q. Would you argue with him about it?

Mr. Green: Let me object. I think you are asking questions that are becoming speculative in nature. I don't see how he can give a knowledgeable answer to something that may or may not occur.

Q. (By Mr. Richter) If I understand your testimony, you have not agreed to any maximum or minimum fee with Mr. Green? A. You understand exactly.

Q. You have not agreed to any basis on which his fee would be computed? **[79]** A. We have not.

Q. You have agreed to pay all of the expenses no matter what they are and regardless of the outcome of the suit? A. I have.

Q. And you also agreed to pay him whatever fees he might charge? A. I have.

Q. Did Mr. Green, in reaching this agreement, tell you that he expected you would not have to pay him any fee out of your own money? A. The fee out of my own money?

Q. Right. Did he tell you he expected to recover a fee out of any amount he might recover in this case from the Defendants? A. Now I don't understand the question.

Q. Did Mr.Green tell you that he did not expect you to pay him any amount for his fee out of your own money? A. No, he didn't tell me.

Q. Did he tell you in reaching any agreements that he expected that his fee would be paid out of the amounts recovered from the Defendants? A. No, he didn't tell me that.

Q. Did he tell you in reaching this agreement that he expected that any expenses he incurred would be paid out of **[80]** the amounts recovered from the Defendants? A. No, he didn't tell me that.

Q. Did he tell you that he did not anticipate that you would ever have to pay him any expenses? A. No, he didn't tell me that.

Q. Did you have any agreement as to when you will pay him expenses which he has incurred in the prosecution of this case? A. When the case comes to a conclusion.

Q. And your agreement is that you do not have to pay him any expenses until the case is over? A. Unless he sent me a bill before then, but that was——

Q. But your understanding is that you will not have to pay anything until the case is over? A. The conclusion, until he determines what his expense and what his fee will be.

Q. Does your agreement on representation include an agreement on how far Mr. Green will handle the case for you under the agreement which you testified to? A. How far?

Q. Right. For example, to help you: Does this include the trial, does this include an appeal, and how high an appeal? A. Until the case reaches a conclusion, to take it to a conclusion.

[81] Q. Do you have any agreement with respect to his representation in the event that there should be an appeal of the case by either party to an apparent complete course? A. Do w[illegible]e an agreement?

[illegible]ight. A. I said that I would pay his expenses, his fees, and the cour[illegible]sts to the conclusion of the case.

Q. But you haven't—your agreement doesn't specify what the conclusion consists of? A. We haven't talked about an appeal.

Q. And your agreement did not involve specifically the question of whether an appeal would be included? A. No, we have—I am sure—about an appeal, I don't know, no.

* * * * * * *

[91] Q. If the class cannot recover, are you asking the court to give you your loss in this case? A. No.

Q. You don't want to recover in this case if you can't recover for the whole class; is that your testimony?

Mr. Green: Let me object if only to distinguish between whether you are talking about an issue of liability or an issue of class action status. Obviously if the liability isn't there, nobody recovers, and if there is no class action there can still be liability on the part of the individual.

Q. (By Mr. Richter) That's a good clarification. Chief, do you understand that this case basically has two **[92]** claims. That there is one claim on behalf of you and your wife to recover what you lost, and another claim that you are representing a class for everything that supposedly the class lost, and it may happen that you cannot maintain this as a class and all that would be left would be your own complaint. Have you understood that? A. Yes.

Q. And are you seeking recovery on behalf of yourself and your wife in this case even if the class can't recover? A. No.

Q. You don't want to recover in this suit if the class can't recover; is that correct? A. Well, I know this is a class action suit.

Q. What if it is not a class action suit, are you still making a claim for your own loss just for you and your wife in that case? A. No.

Q. If it is not a good class action suit, you don't want to recover in this case; is that correct? A. I don't want to recover?

Q. Well, that's what you just testified to. I don't think that's accurate, and that is why I am trying to help you and ask you if you are making a claim for your own twenty-five hundred dollar loss in this case separate from the class action if it's not a good class action. **[93]** A. I guess I don't understand, because

I thought a class action was for all of the shareholders, and if you win, all of the shareholders could share in it.

Q. That's not necessarily true. You want to get your twenty-five hundred dollars back even if the other people can't get their loss back?

Mr. Green: I am going to object for the record. I think he already answered the question. Bill, and we don't appreciate the assistance that you claim you are giving him. I think he answered that question.

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[2] CONTINUED DEPOSITION OF CECIL LIVESAY
taken on the 30th day of April, A.D. 1974

[3] **Cross-Examination**

By Mr. Hennelly:

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[83] Q. (By Mr. Hennelly) If Judge Wangelin decides that this suit should not be a class action, what is your arrangement with him to cover his fees then? A. That it should not be a——

Q. A class action. A. A class action? We haven't discussed that.

Q. Aside from Mr. Green's fees, what is your agreement with him with respect to court costs and expenses of discovery? A. That I would have to bear those, the expenses and the court costs.

Q. What about the cost of notifying all of the members of the class? A. That would be my responsibility.

Q. What about the cost of retaining experts to testify in support of the class action? A. That would be in the expenses.

Q. Is there any understanding as to a maximum amount which you would have to pay to cover these costs? A. No.

Q. Is the agreement in writing? A. No.

[84] Q. Has your agreement with Mr. Green changed at all since the last time we met here? A. No.

* * * * * * *

[98] Q. Why did you bring a class action on behalf of a whole group of people instead of just suing on your own behalf, Mr. Livesay? A. Well, it was a public offering, and it was not only—I was not the only shareholder. And if I was misled or something was wrong with it for me, it would be for everyone.

[99] Q. Well, do you understand that you could have sued on your own? A. That I could have sued on my own?

Mr. Green: Let me object to it. It's irrelevant as to anything that he could do or he could not have done, but you can answer the question whether you knew if you could have sued on your own or not.

A. No, I would think it would have to be a class action suit.

Q. (By Mr. Hennelly) Why do you think it would have to be a class action suit? A. Well, because there were a number of other shareholders. Everyone who purchased this read the same prospectus and got it at the same price with probably the same information.

Q. Do you don't think you could have gone into court by yourself and sued? A. No.

Q. Could you tell me in your own words who you think is in your class that you represent in this lawsuit? A. All the other individuals that purchased the stocks and the debentures that particular date to public offering.

Q. All right. Did you have any discussions with your attorney as to anybody else to include in the class? A. Who to include in the class? It was his investigations as to who he thinks should be joined in the class.

[100] Q. Did you make any recommendations with respect to the size or the composition of the class? A. No.

Mr. Green: Let me object and ask that the answer be stricken. I don't think that question is capable of a knowledgeable answer. How does one recommend the size of a class. That's a matter of fact and a matter for a court to determine judicially and not for a named Plaintiff to determine how many he would like to have in the class that he represents, so I object for that reason.

Q. (By Mr. Hennelly) How did you arrive at the decision to sue the company and some of its officers and the accountants but not A. G. Edwards, the underwriter? A. How did I?

Q. Yes. A. Well, I wasn't the one that arrived at it. I presented my attorney with what little information I had and what information I could secure and requested him to conduct an investigation and sue those that he thought was responsible.

Q. Did he discuss with you any particular reason for not filing suit against A. G. Edwards?

Mr. Green: Let me object. I think you are encroaching on our attorney-client privilege. If you are only asking if there was a discussion with the general subject matter of something, I don't mind if he answers it. But if you are **[101]** asking him what was said between us with respect to it, I will have to instruct him not to answer the question.

Q. (By Mr. Hennelly) Did your attorney indicate to you why he wasn't filing suit against A. G. Edwards?

Mr. Green: I will instruct you not to answer that question on the grounds that it tends to invade the attorney-client privilege. We are not waiving that privilege.

Q. (By Mr. Hennelly) Did you ask your attorney at any time why A. G. Edwards was not named as a Defendant in this lawsuit?

Mr. Green: That's the same question rephrased and so I will instruct you in the same way not to answer the question.

Q. (By Mr. Hennelly) Are you at all puzzled by the fact that A. G. Edwards is not one of the named defendants in this lawsuit? A. Am I?

Q. Puzzled? A. No.

Q. That doesn't bother you at all? A. No.

Q. Have you had any conversations with Mr. Green with respect to retaining experts to testify in your behalf in this lawsuit?

Mr. Green: That's kind of a borderline question, John, and while you are not specifically asking what we said, **[102]** the question, since you put in a lot of facts at the very beginning of the question, is a loaded question and borders on our privileged communications. And if you think about it, you might agree.

Mr. Hennelly: I asked whether he had any discussions.

Mr. Green: But you didn't just ask that. You asked if there were any discussions with respect to the possible employment of expert witnesses, and so it does border on the nature of the discussion between us. But I can tell you the answer is no, if that is helpful.

Q. (By Mr. Hennelly) If the Judge were to decide that this case wasn't proper for a class action, would you proceed with it on your own? A. If he decided that it was not proper for a class action, would I proceed on my own?

Mr. Green: Let me object to the question because I think it's speculative. I don't think he should be put in a position where he has to give an answer to a question today on something that, number one, may never come about, and number two, if it does, it might not be for many months from now. And third, a decision that he really wouldn't make until he

conferred with his lawyer and the thing is discussed from beginning to end, if it ever gets to that point, so I wouldn't—I will let him answer the question, but I don't want you to feel that is bound by the answer that he gives today as to what **[103]** his feelings might be six months from now, an unlikely eventuality.

Q. (By Mr. Hennelly) If you can remember the question. A. I guess—I couldn't give a yes or no. I would have to consult Mr. Green and ask him his advice on this on your question.. And if he said yes, then I would proceed, yes.

Q. How much do you have presently in the stock market, in stocks and bonds? A. Forty thousand.

Q. Would that include your municipal bonds and—— A. Yes.

Q. How about in savings accounts? A. $5,000.00

Q. Do you own any other real estate besides your home? A. Not at this time.

Q. Certificate of deposits? A. No, no certificates, no.

Q. What is the market value of your home? A. Forty thousand. Between forty and fifty.

Q. How much equity do you have in it? A. All about eleven or twelve thousand dollars paid.

Q. You've got about—— A. Thirty.

Q. Thirty in equity? A. Uhuh.

[104] Q. Do you have any other major debts besides the outstanding mortgage on your home? A. I don't have any at all.

Q. Would you say your net worth then is somewhere in the range of $75,000.00?

Mr. Green: That's jointly with his wife?

Q. (By Mr. Hennelly) I am assuming that all of this is jointly with his wife already. He already testified that she didn't own anything independently. A. Seventy-five and one hundred thousand.

Q. How much of that would you be willing to commit to the prosecution of this lawsuit? A. As much as necessary.

Q. If it's necessary to commit $50,000.00, would you commit $50,000.00 to it?

Mr. Green: Let me object to something that is really so far out of line, John, that it borders on being really an unfair question. You know, if you ask him if he is willing to commit five thousand or something like that, when it comes down to the realm of what the cost really might be in this case, but when you are talking about $50,000.00, it's such a gross exaggeration, and so unrealistic, it really isn't a fair question, and I don't think he can give you a knowledgeable answer to that one. And furthermore, Bill Richter covered this ground previously and it is **[105]** repetitious.

Mr. Hennelly: Well, are you telling me then that if the case were to be lost, he could not be charged anymore than say $5,000.00, you would waive all the time that you put into this?

Mr. Green: Without waiving our attorney-client privilege what I am saying is——

Mr. Hennelly: That goes directly to the fee agreement.

Mr. Green: As he testified, there is no specific dollar and cent amount described. I have advised him as to what I believe the cost might be. They could be four or five thousand dollars. And he told me, "Yes, that he will take care of that once an itemized statement is made", which I think he testified to, and the bills have been reasonable. We never discussed the possibility that there could be $50,000.00 in costs here, and the mailing costs for the notices was four or five hundred dollars.

Mr. Hennelly: What about your fees?

Mr. Green: Well, he testified that the court has discretion to award those fees and may or may not award them. And he is not responsible——

Mr. Hennelly: He is not responsible for the fees if the suit is not successful?

Mr. Green: That's right. He is not obligated to pay me any fees whether we win or lose this lawsuit. I mean, **[106]** I believe I am testifying on his behalf in a sense, and I don't mean to, but I am trying to curtail this a little bit.

Mr. Hennelly: Well, that's fine, I'm trying to get that.

Mr. Green: I know you have, and that is why I am giving you a rather lengthy statement as to our fee arrangement, because what I know you really want is facts here, and it doesn't really matter where they come from, but, really, that's the arrangement.

Mr. Hennelly: I don't have any further questions. I thank you very much for your time, Mr. Livesay.

Redirect Examination

By Mr. Mills:

Q. Mr. Livesay, have you discussed with your counsel the possibility that you may have to pay our attorney's fees in the event that you are unsuccessful in this lawsuit? A. Pay your attorney fees?

Q. Yes. A. The court costs?

Mr. Green: He wants a yes or no answer.

A. No.

Q. (By Mr. Mills) So at this point in time, you are not aware of the possibility that you may be required to pay our attorney fees? A. No.

[107] Q. Or Mr. Hennelly's attorney's fees? A. No.

Mr. Green: He hasn't asked for them and it's impossible anyway to support a class action by the Defendants.

Q. (By Mr. Mills) Have you discussed with your attorney the possibility that you may be required to pay our other expenses, the expenses with the Defendants, in addition to their attorney's fees? A. No.

Q. Independent of any discussions with your attorney, do you have any awareness of any possibility such as that? A. Your expenses? No.

Q. If you were advised of that possibility, would it affect your determination to proceed with this class action? A. No, not now, it couldn't now, no.

Q. So that even if you recognize a possibility that you might have to pay our attorney's fees and our expenses, the attorney's fees and expenses of the other Defendants, you would still proceed with the class action? A. Definitely.

Q. Without any concept of what the dollar amount might be involved? A. I would have to know—yes, I would have to proceed with it now.

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[2] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEPOSITION OF DOROTHY LIVESAY taken on the 19th day of April, A.D. 1974.

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[3] **Direct Examination**

By Mr. Richter:

Q. Would you state your full name, please? A. Dorothy Livesay.

Q. Where do you live, Mrs. Livesay? A. In Glendale.

Q. And what is your address? A. 955 Glen Way.

Q. How long have you lived there? A. Nine years, approximately.

Q. Are you currently employed? A. Yes, I am.

Q. And what is your occupation? A. Office manager.

Q. With whom? A. Woodard Rug & Drapery Cleaners.

Q. Where are they located? A. In Rock Hill.

[4] Q. How long have you been employed there? A. Eleven years.

Q. Mrs. Livesay, I represent all of the Defendants except Coopers and Lybrand in the case wthich you have brought against Punta Gorda Isles, Etc., et al. And I am going to ask you some questions here. If you don't understand my questions or if you don't understand a word I use, or if you have any question at all, you let me know and then we will proceed. You are the Dorothy Livesay who is the Plaintiff in this

suit, Cecil Livesay and Dorothy Livesay versus Punta Gorda Isles, Incorporated, Etc., and other Defendants, are you not? A. Yes, I am.

Q. Mrs. Livesay, what is your highest level of formal education? A. High school.

Q. And you are a high school graduate? A. Yes, I am.

Q. And from what high school did you graduate? A. Soldan Blewett.

Q. And Cecil Livesay, the other plaintiff in this action, is your husband; is that correct? A. That's right.

Q. How long have you been married to him? A. Twenty-one years.

[5] Q. And as I understand he is a police officer? A. That's correct.

Q. Do you have any children? A. Yes, we do.

Q. How old are they? A. Eighteen and three.

Mr. Righter: Off the record.

[Whereupon there was an off the record discussion.]

Q. (By Mr. Richter) Prior to the time you purchased the debentures in stock of Punta Gorda Isles, Incorporated, as alleged in your complaint, had you ever purchased any other corporate securities? A. Yes, sir.

Q. When was the first time that you can recall of ever purchasing any corporate securities? A. I really don't remember, recall.

Q. Approximately how many years ago was it? A. It would be strictly a guess. My husband handled it, and I really don't—it would have to be strictly a guess.

Q. Have you ever yourself had any direct dealings with a broker? A. No.

Q. Do you know whether your husband purchases securities in joint names with yourself and himself as a matter of course? A. I don't understand what you mean.

Q. Are both of your names on the stock? **[6]** A. Yes.

Q. You had nothing to do with the purchasing of the securities; is that correct? A. That's correct.

Q. And you had nothing to do with the sale of securities? A. No, I hadn't.

Q. Do you have any knowledge of the approximate value of all of the securities owned by you and your husband in May of 1972? A. No, I don't.

Q. Do you know whether it would be more than $10,000.00? A. I doubt it.

Q. But you don't have any personal knowledge of the value at that time? A. No, no.

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[21] **Cross-Examination**

By Mr. Hennelly:

Q. Mrs. Livesay, I represent Coopers and Lybrand Accounting. What are your children's names? A. Melissa and Linda.

Q. And which child is eighteen, and which—— A. Linda is eighteen.

Q. Linda is eighteen? A. And Melissa is three.

Q. Are they both in good health? A. Yes, they are.

Q. Your husband is in good health, I take it? A. Yes.

Q. And Melissa was eighteen—— A. No, Melissa is three and Linda is eighteen.

Q. Is she going to college next year? A. Yes, she is.

Q. Do you know where she is going to college? A. She is not sure.

Q. Does she have any school under consideration? A .Yes, Cape Girardeau.

Q. Cape? A. Uhuh.

Q. Do you have any knowledge offhand how much it costs **[22]** to—— A. Yes.

Q. ——to attend college at Cape? A. Yes.

Q. About how much would that be? A. About twelve hundred a year.

Q. Do you expect to pay for that? A. Yes, we partly, and she also will pay part.

Q. About what portion would you be paying and what portion would she be paying for? A. I would assume probably sixty-forty.

Q. How much do you earn a year at Woodward Rug & Drapery Cleaners? A. Between eight and nine thousand.

Q. Between eight and nine thousand? A. Yes.

Q. Do you have any bank accounts which are separate from your husband's? A. No, I do not.

Q. Do you own any property which is separate—— A. No.

Q. ——separate from your husband? A. No.

Q. No securities? A. No.

Q. Any other real estate? **[23]** A. No.

Q. Any other things of value, jewelry or antiques, which would be of sufficient value that you owned independent from your husband? A. No.

* * * * * * *

[27] Q. How much do you have in the bank? A. I don't know.

Q. Do you presently own any other securities? A. I believe so.

Q. Could you tell me what those are? A. No, I couldn't.

Q. Do you own any other real estate with your husband besides your house? A. No.

Q. How much of your own money would you be willing to expend in prosecuting this lawsuit? A. Whatever it took.

Q. If it took three or four or five thousand dollars, would you be willing to spend that? A. Uhuh.

Q. Even though you told us you only lost twenty-seven hundred dollars? A. Yes.

Q. And there was a possibility that you would not be reimbursed at all? A. Yes.

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[29] **Redirect Examination**

By Mr. Richter:

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Q. Mrs. Livesay, I want you to listen to this question very carefully and only answer the question that I ask. Do you have any signed fee agreement with Mr. Green? A. No.

[30] Q. Have you made any oral agreement with Mr. Green concerning his fee? A. No.

Q. Did your husband, prior to the time he sold the Punta Gorda securities, tell you why he was going to sell them? A. Yes.

Q. And what reason did he give you?

Mr. Green: I think at that point you are now touching on privileged matters, and I will instruct the witness not to answer the question. Off the record.

[Whereupon there was an off the record discussion.]

Q. (By Mr. Richter) Did your husband say anything to you about the prospectus being incorrect before he sold the stock?

Mr. Green: Same objection and the same instructions to Mrs. Livesay. In other words, that she is not to answer it because it constitutes privileged information.

Q. (By Mr. Richter) Mrs. Livesay, when did you first obtain any information that the prospectus might be incorrect? A. He mentioned——

Mr. Green: Just a minute.

Q. (By Mr. Richter) I asked you when you first obtained this information? A. I don't recall.

Q. Do you recall whether it was before or after your **[31]** husband sold your Punta Gorda securities? A. Before.

Q. And would you state to me the names of all persons from whom you received any information that the prospectus was incorrect prior to the date that you sold the stock? A. That I received?

Q. Right. A. My husband.

Q. Now would you state to me the names of all persons from whom you received any information that the prospectus was incorrect after the date you sold the stock? A. Of my attorney, Martin Green, and my husband.

Q. What information were you given prior to the date that your husband sold the stock relating to the prospectus being incorrect?

Mr. Green: Wait. I'm going—the same instructions, not to answer, because her previous testimony indicates that the sources of this information is either her husband or her lawyer, and in either case it would be privileged, so——

Mr. Richter: She didn't get anything from her lawyer prior to the time the stock was sold, and that was the question. What

information she received about the prospectus being incorrect prior to the time the stock was sold.

Mr. Green: I stand corrected in that point, but she had testified that it all came from her husband, and so I think it is privileged, and you are not to answer the **[32]** question.

Q. (By Mr. Richter) Did you have any opinion prior to the time that you sold the stock on whether the prospectus was incorrect or misleading? A. Other than what he said.

Q. Did you have any opinion yourself? A. Well, yes, I thought he was right.

Q. In what respect did you believe the prospectus was misleading prior to the time that you sold the stock, your stock? A. Well, the dredging and the accounting.

Mr. Richter: That's all I have.

Recross-Examination

By Mr. Hennelly:

Q. How long prior to the time that you sold your stock did you formulate this opinion? A. I don't—I don't know.

Q. Was it the day before? A. I doubt it.

Q. A month?

Mr. Green: Let me object for two reasons. First of all, she said she doesn't know, and second of all, it's beginning to border on the conversations that she had with her husband. She already indicated that was her only source, so I will instruct her on this point not to answer it.

Mr. Hennelly: Wait a minute! I haven't asked about any **[33]** conversations. I asked her about her own personal opinion, and I am not badgering her. She said—I am trying to help her focus in on some kind of time, at least a framework of time.

Mr. Green: The opinion is based directly on conversations. Asking her opinion is the same thing as asking her about conversations at this point.

Mr. Hennelly: I am asking her about what point in time. I am not asking for any substance of opinion.

Mr. Green: I think she said she didn't know.

Mr. Hennelly: I am trying to help her focus it on it. If you want to register your objection to that and go on the record, that's fine, but that doesn't mean that she is waiving any privileges. I can inquire into dates.

Mr. Green: Well, as she said she doesn't know, so——

Q. (By Mr. Hennelly) You indicated that you may have formulated this opinion prior to the time that you sold the stock but probably not the day before. Could it have been as long as a month before? A. It could have been. I don't know.

Q. Could it have been as long as two months before? A. I don't know.

Q. Three months before? A. I don't know.

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION FOR ORDER TO DETERMINE THAT CLASS ACTION CAN BE MAINTAINED UNDER RULE 23

(Filed April 11, 1974)

Plaintiffs move that the Court enter its Order determining that the above entitled action may be maintained as a class action for the reason that all of the requirements pertaining to the maintenance of class actions under Rule 23 have been met.

ANDERSON, GREEN, FORTUS &
LANDER
By MARTIN M. GREEN
Attorneys for Plaintiffs
120 South Central, Suite 938
Clayton, Missouri 63105
862-6800

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed May 14, 1974)

This matter is before the Court upon the motion of the defendant, Coopers & Lybrand, for a limited stay of discovery pursuant to Rule 26(c), Federal Rules of Civil Procedure.

Said defendant urges that all discovery in this action, except that relating to the class action determination, be stayed pending a ruling by the Court as to the existence of a class action. It would seem that such contention is a viable one considering its implications of judicial, time and pecuniary economy. Such a limitation on discovery is within the discretion of this Court; *Houndry Process Corp. v. Commonwealth Oil Ref. Co.*, 24 F.R.D. 58 (S.D.N.Y., 1959); *Bordonaro Bros. Theatres, Inc. v. Loew's Inc.*, 7 F.R.D. 481 (S.D.N.Y., 1947). Accordingly,

It Is Hereby Ordered that the motion for a stay of discovery, except that relating to the class action determination, be and is Granted and that such discovery shall be pursued with due deliberate speed.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 13 day of May, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

[1] TRANSCRIPT OF ARGUMENT ON MOTIONS

Transcript of argument had in the above-styled matter before the Honorable H. Kenneth Wangelin, Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 3 thereof.

June 24, 1974

Appearances:

Mr. Martin M. Green and Mr. James A. Eidelman for the Plaintiffs;

Messrs. Bryan, Cave, McPheeters & McRoberts, by Mr. Veryl L. Riddle and Mr. J. Roger Edgar for Defendant Coopers and Lybrand;

Messrs. Peper, Martin, Jensen, Maichel & Hetlage, by Mr. Lewis R. Mills for Defendants Punta Gorda Isles, Inc., et al.

The Court: All right, you may proceed, gentlemen.

Mr. Green: Thank you, Judge. Your Honor, in this **[2]** motion, which, of course, is the class action portion of the case previously filed by the plaintiffs, we feel that this is a garden variety situation for a class action determination. As Your Honor knows, this entire lawsuit is predicated upon what we believe to be false, misleading and untruthful statements disseminated to the purchasers of Punta Gorda stocks and bonds at

a public offering in May of 1972. The misleading statements, untruthful statements that we've alleged were all identical and uniform with respect to the entire class, which was eighteen hundred people who bought at the public offering, and they were all contained in the preliminary and the definitive prospectus, which, by law, must be delivered to be each member of the class at the time that they purchase these stocks or bonds. The prospectus which contains all of the misleading statements has been admitted into the pleadings by both of the defendants. There isn't any dispute about the fact that what we have alleged to be the prospectus is indeed the prospectus.

The fraud in this case was a very, very large one involving the sale of some $15,000,000 at face value of Punta Gorda on debentures by the company and the sale of several million dollars worth of the company's common stocks by its two principal owners. The plaintiffs in this case, the plaintiffs in this case, Cecil Livesay and his wife, sustained an over-all loss at the time that they sold their **[3]** stocks and bonds after buying them at the public offering of about $2,625. The over-all loss to the entire class is something like in excess of $8,000,000.

* * * * * * *

[5] The named plaintiffs testified in their depositions that they are willing to spend more money than their actual loss in order to properly and fairly and adequately represent **[6]** the class in this matter. They indicated a net worth of something around $40,000 and a deep conviction and desire to see that redress is provided for the members of the class who lost their money in this public offering, so with respect to adequacy, I at least don't see any serious hurdle to a class action determination.

* * * * * * *

[8] They have said they weren't denying A. G. Edwards in the case, that was the underwriter in this case. I'm not sure

what they're getting at. At this point it's true, I've not joined them, I've explained to them and I've put in the brief—we feel at this point we haven't done sufficient discovery to make that determination and we simply don't want to join everybody in sight with the shotgun type of lawsuit and we're only going to join those people that we feel we have a substantial case against and it may well be A. G. Edwards in the near future.

They claim that an evidentiary hearing is required in these cases, and that simply isn't so. The wealth of opinions in this case say that only in certain isolated situations is an evidentiary hearing required for a Court to determine that there is a class action.

* * * * * * *

[26] In our memorandum we cite cases for the proposition **[27]** that the burden of proof on the class action issues is on the plaintiff. Plaintiffs have cited no contrary cases and I think we can accept that as a given starting point.

The Court: How long, gentlemen, would a hearing as to whether or not—I'm not talking about argument on motions, I'm talking about a regular full dress hearing on whether or not this should be a class action. I'm talking about introduction of evidence. How long would that take me?

Mr. Mills: Maybe a day, maybe a half a day.

Mr. Green: I would say that sounds about right if the Court —if there's evidence to be adduced, I can do it.

The Court: Well, I don't know, a hearing—assuming there's a question in the Court's mind I think the hearing should be had, how long do you think it would take, Mr. Riddle?

Mr. Riddle: Your Honor, a hearing on that, I think if all of us would be prepared, could be concluded in a day and a half.

The Court: All right. Pardon me, go ahead, Mr. Mills.

Mr. Riddle: That's my estimate on it. Is that consistent with yours?

Mr. Green: I think it will depend on what issues, if any, the Court thinks will require evidence. If there's one or two or three, I'd say a day.

The Court: Well, I'm going to get over this legal **[28]** hurdle on reliance.

Mr. Green: It's been exhaustively briefed, Judge, by all of us.

The Court: That's a threshold matter I think in this instance as far as whether or not this is to be declared a class action. Go ahead, Mr. Mills.

Mr. Mills: Plaintiffs have the burden of proof. There are a variety of ways they could have attempted to meet it; through request for admissions, through proposed stipulations, through the admission of evidence. They haven't done any of these things. They've made some factual assertions in their brief and these do not bring facts properly to your attention. We might say that the plaintiffs haven't met their burden of proof on a variety of issues, the most crucial one of which is the adequacy of their representation.

Mr. Green has suggested that nobody has questioned his adequacy as counsel, and that is true in a sense, but that's true primarily because one of the avenues we attempted to explore on deposition was blocked by the claim of attorney-client privilege.

One of the questions that concerns us very much in this case is plaintiffs' failure to join the underwriters. The underwriters are not just A. G. Edwards & Sons, Your Honor, there is a whole list of the underwriting syndicate towards **[29]** the back of the prospectus. Certainly it is consistent with everything that we know about the case that Mr. Green represents a member of that syndicate. He has entered his appearance in a court in the County for the partners of I. M. Simon, one

of the underwriters. We submit, Your Honor, that Mr. Green may very well have a conflict of interest that bears very much on the adequacy of representation issue that should be explored at an evidentiary hearing, but that in any event, a determination that it can proceed as a class action without an evidentiary hearing would be premature. The facts simply aren't in the record to support that kind of a finding.

* * * * * * *

[34] The Court: I understand what you said and I understand the difference of opinion. What do you say about this conflict?

Mr. Green: Which conflict?

The Court: Their statement there's possibility of conflict of interest, that you represent Simon and Simon's one of the underwriters?

Mr. Green: There's no conflict of interest at all on that case. I've given serious consideration to joining A. G. Edwards in this case.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

(Title Omitted in Printing)

MEMORANDUM AND ORDER

(Filed July 16, 1974)

This matter is before the Court upon the motion of the defendants Coopers and Lybrand to dismiss Counts I and II as a class action.

The claimed class action status is founded upon the allegations that certain information contained in a Registration Statement and accompanying Prospectus filed by the defendant, Punta Gorda Isles, Inc., with the Securities and Exchange Commission in connection with the registration and offering to the public of $15,000,000 of debentures and 171,570 shares of its common stock, was false and misleading. Plaintiffs seek redress for the misrepresentations against various defendants pursuant to Sections 11, 12(2) and 17(a) of the Securities Act of 1933 and Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The salient thrust of defendants' motion to dismiss revolves around the issue of reliance. Defendants contend that each member of the class must establish his own individual reliance as a prerequisite to the maintenance of a claim under 10b-5, that to do so would cause judicial chaos, and that consequently the class action should be dismissed. However, the strength of this contention has been severely limited by a myriad of cases which have practically eliminated the requirement of proving individual reliance in Rule 10b-5 class actions. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970); *Korn v. Franchard Corp.*, 456 F.2d 1206 (1972); *Kahan v. Rosenstiel*, 424 F.2d 161 (3rd Cir., 1970), cert. den. sub nom. *Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1969); *Entin v. Barg*, 60 F.R.D. 108 (E.D. Pa., 1973); *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M,D. Pa., 1973). Cases which hold to the contrary involve situations unlike the instant one, such as where the action is based on oral misrepresentations, *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880 (5th Cir., 1973); *Morris v. Burchard*, 51 F.R.D. 530 (S.D.N.Y., 1971); *Moscarelli v. Stamm*, 288 F.Supp. 453 (E.D.N.Y., 1968), or where the written misrepresentations vary or emanate from several sources. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir., 1964); *Frankel v. Wyllie and Thornhill, Inc.*, 55 F.R.D.

330 (W.D. Va., 1972); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y., 1968); *Richard v. Cheathan*, 272 F.Supp. 148 (S.D.N.Y., 1967). Herein, the materials involved are the written Registration Statement and Prospectus disseminated so as to reach the investors. Such materials do not vary nor do they originate from several sources.

Moreover, as plaintiffs' claims go to a failure to disclose a number of factors in the Registration Statement, then "positive proof of reliance is not a prerequisite to recovery." Rather, "all that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens v. United States*, supra at 153-4. At this time the threshold question of materiality must be answered in the affirmative, that a reasonable investor might have considered certain nondisclosures in the Registration Statement as important in the making of his decision.

Accordingly,

It is Hereby Ordered that the motion to dismiss be and is Denied.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 16th day of July, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEFENDANT COOPERS & LYBRAND'S MOTION TO MODIFY THE COURT'S ORDER DATED JULY 16, 1974 RELATING TO "RELIANCE"

(Filed October . . , 1974)

Comes now defendant Coopers & Lybrand and respectfully moves the Court to modify its Order dated July 16, 1974 relating to "reliance" for the following reasons:

1. As stated in this Court's Order dated September 23, 1974, the class action question pending before the Court has yet to be determined.

2. Defendants Coopers & Lybrand has heretofore argued and represented to this Court that the question of "reliance" is an issue which the Court should fully consider in finally determining the class action questions raised by the plaintiff's motion filed on or about the 9th day of April, 1974 seeking an Order to certify this case under Rule 23.

3. The allegations in the Complaint in this purported class action allege violations of Rule 10b-5 and an analysis of said allegations clearly indicate that "misrepresentation" is the main thrust of the plaintiff's theory on which recovery is sought.

4. While the complaint also alleges nondisclosures, the preponderance of the allegations, when analyzed, are affirmative misrepresentations.

5. While individual "reliance" may not be a predicate for recovery in a pure "nondisclosure" case, the law in the Eighth Circuit, and the United States Supreme Court, is that individual "reliance" is a predicate to recovery of damages in a "misrepresentation" case under Rule 10b-5. *Myzel v. Fields*, 386 F.2d 718, 736-37 (8th Cir. 1967); *City National Bank of Ft. Smith v. Vanderbloom*, 422 F.2d 221, 230-31 (8th Cir. 1970); *SEC v. First Am. Bank and Trust Co.*, 481 F. 2d 673 (8th Cir. 1973); and *Affiliated Ute v. United States*, 406 U.S. 128 (1972).

Respectfully submitted,

BRYAN, CAVE, McPHEETERS
& McROBERTS
By VERYL L. RIDDLE
JOHN J. HENNELLY, JR.
500 North Broadway
St. Louis, Missouri 63102
231-8600
Attorneys for Defendant
Coopers & Lybrand

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISSOLVE STAY ORDER RELATING TO DISCOVERY

(Filed September 4, 1974)

Come now the plaintiffs and move that the Court enter its Order dissolving the Stay Order entered by the Court on May 14, 1974, on the following grounds:

1. On or about April 30, 1974, defendant Coopers & Lybrand filed a Motion Requesting the Court to Stay All Discovery not related to the class action determination until the class action issue is resolved; said Motion was based primarily upon defendants' desire to save the legal fees and other costs connected with discovery proceedings pending rulings on the class action motions;

2. That since discovery was stayed by the Court on May 14, 1974, the Court, although not ruling on plaintiffs' Motion for Class Action Determination, did, on July 16, 1974, overrule Coopers & Lybrand's Motion to Dismiss the class action herein; the Court has also denied Punta Gorda's Motion for Security for Costs, and in so doing, indicated in its Order, that "From the record it does not appear that the Complaint is without merit or that the plaintiff is unlikely to succeed, . . ."

3. That the within action was filed more than one year ago, and plaintiffs have been and continue to be seriously prejudiced by their inability to proceed with the normal discovery

procedures, including depositions, provided in the Federal Rules of Civil Procedure; that the longer the plaintiffs are deprived of the right to depose witnesses and review and copy documents in the defendants' possession, the weaker their case becomes, especially as certain witnesses, and documents, may become unavailable;

4. That plaintiffs estimate they will need approximately five to six months to complete their depositions and other discovery to prepare the case for trial once the stay order is lifted;

Wherefore, plaintiffs pray that the Court enter its Order dissolving the Stay Order of May 14, 1974, relating to discovery by the parties herein.

ANDERSON, GREEN, FORTUS
& LANDER
By MARTIN M. GREEN
Attorneys for Plaintiffs
120 South Central, Suite 938
Clayton, Missouri 63105
862-6800

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

FURTHER SUGGESTIONS OF PLAINTIFFS IN SUPPORT OF THEIR MOTION TO DISSOLVE STAY ORDER RELATING TO DISCOVERY

(Filed September 23, 1974)

Plaintiffs have moved the Court to dissolve the Stay Order relating to discovery which was entered on May 14, 1974, and all defendants have filed memoranda in opposition to this Motion. In their memoranda the defendants allege that following oral argument with respect to the class action motions which took place on June 24, 1974, the Court referred to the possibility of an evidentiary hearing.[1] At that time plaintiffs' counsel advised the Court that while plaintiffs had no opposition to such a hearing, he believed there was already a sufficient basis for the Court to uphold plaintiffs' Motion for Class Action Determination based upon the pleadings, the depositions of both plaintiffs, affidavits filed with the Court and oral argument of counsel. In their Briefs in Support of the Motion, plaintiffs cited numerous cases which indicated that nothing more was required for the Court to allow the class action to proceed. Additional cases were cited to demonstrate that almost every Court faced with the issue of whether or not there should be an evidentiary hearing considered it to be an utter waste of the Court's time. Under these circumstances, for any

[1] Defendant Coopers & Lybrand in its Memorandum states that the Court indicated "there would have to be an evidentiary hearing . . . Plaintiffs' counsel does not remember that the Court made a comment or entered an order *requiring* an evidentiary hearing.

of the defendants to suggest in their memoranda that the continuing existence of the Stay Order has resulted from plaintiffs' failure to request such an evidentiary hearing is the grossest possible perversion of the facts, especially in view of plaintiffs' statement in a Brief heretofore filed with the Court to the effect that they were not opposed to an evidentiary hearing if the Court deemed it necessary. Plaintiffs are convinced that sufficient evidence has been adduced to warrant the Court's class action determination, especially since the key issue in any class action determination motion, viz. reliance, has already been resolved in favor of the plaintiffs and against the defendants.[1]

While the defendants urge the Court not to dissolve the Stay Order because plaintiffs have failed to adduce evidence of actual prejudice, it should be noted that the Stay Order was entered in the first place solely on the strength of the Motion without a scrap of evidence being presented to the Court to support the Motion. The longer the defendants herein can delay the progress of this case by plaintiffs, the happier they will be. In the meantime although the defendants have fully deposed both plaintiffs, plaintiffs' case has come to a total standstill. The rules never contemplated that because defendants might incur some legal fees, they would be entitled to a Stay Order for an indefinite period of time and the Court is urged to dissolve the Stay Order, or in the alternative, either sustain plaintiffs' Motion for Class Action Determination, which would make the Stay Order a moot issue, or set a date for an evidentiary hearing with respect to this Motion if the Court deems it necessary.

[1] Notwithstanding that Mr. Riddle during oral argument specifically told the Court that reliance was required.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ORDER

(Filed September 23, 1974)

This matter is before the Court upon plaintiffs' several motions. Plaintiff has filed motions seeking an order enjoining destruction of documents by the defendant, and a motion to dissolve a Stay Order of this Court of May 14, 1974 relating to discovery, or in the alternative an Order modifying the Stay Order to order defendants to produce copies of certain documents requested by the plaintiffs.

Plaintiffs have made no showing in their motion to enjoin defendants from destruction of documents that there is any danger of such destruction and accordingly the motion will be denied. In regards to the proposed dissolution or modification of the Stay Order, the class action questions on which the Stay Order is predicated have yet to be determined. Therefore, the Stay Order will be continued. In consequence,

It Is Hereby Ordered that the motions specified above be and are Denied.

Dated this 23rd day of September, 1974.

/s/ H. KENNETH WANGELIN
United States District Judge

Anderson, Green, Fortus & Lander
Attorneys at Law
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[314] 862-6800

September 26, 1974

Honorable H. Kenneth Wangelin
Judge, Division 3
United States District Court
United States Courthouse & Customhouse
1114 Market Street
St. Louis, Missouri 63101

Re: Cecil Livesay, et ux. vs. Punta Gorda Isles, Inc., et al.
Civil Action No. 73 C 517(3)

Dear Judge Wangelin:

The purpose of my telephone call to you yesterday was to request a pretrial conference for the purpose of determining what steps, if any, should be taken at this time by counsel to expedite the Court's ruling on plaintiffs' Motion for Class Action Determination.

The defendants have indicated in their Briefs recently filed with the Court that they believe I should request an evidentiary hearing with respect to the unresolved class action issues and while I have no objection to this hearing, or making a request therefor, I am uncertain as to what particular issue, if any, would be resolved at such a hearing. Accordingly, I should like to request a conference with the Court, with all counsel present, so that I

may obtain some guidance, at the Court's early convenience, with respect to this matter.

Yours very truly,

/s/ MARTIN M. GREEN

MMG:kg

cc: William A. Richter, Esq.

cc: John J. Hennelly, Jr., Esq.

United States Court of Appeals
Eighth Circuit

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,
vs.
Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),
Respondents,
and
Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division, Room 3,
Nominal Respondent.

No. 74-1827.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

(Filed November 1, 1974)

Petitioners state:

Petitioners Seeking Writ and Relief Sought

The petitioners and the members of the class represented by them (hereinafter the petitioners and all of the members of the

class will be collectively referred to as "petitioners") in the above-entitled class action move the Court of Appeals to issue a Writ of Mandamus directing the Honorable H. Kenneth Wangelin, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division ("the Court" or "Judge Wangelin") to vacate (1) the Court's Order of May 14, 1974, staying all discovery in said action except that relating to the class action, and (2) the Court's Order of September 23, 1974, continuing said stay order.

Statement of the Facts

The facts supporting this Petition are as follows:

1. That on July 27, 1973, petitioners filed a class action against the respondents herein which was assigned to Judge Wangelin. That said class action alleges violations by the respondents of Sections 11, 12(2) and 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, for certain false and misleading statements appearing in the Prospectus in connection with the sale of respondent Punta Gorda Isles, Inc.'s stocks and bonds at their May 2, 1972, public offering;

2. That on April 9, 1974, petitioners filed their Motion for an order, pursuant to Rule 23(c), to determine that the class action may be maintained;

3. That on April 30, 1974, pursuant to an agreement between counsel, respondents, for almost two days, took the depositions of petitioners Cecil and Dorothy Livesay on all issues relating to the pending action;

4. That on April 30, 1974, within hours after respondents had completed their depositions of the same petitioners herein, respondent Coopers & Lybrand, during the course of a pretrial

conference with the Court, filed a Motion requesting a stay of discovery, except discovery relating to the class action determination, until the class action determination had been decided by the Court;

5. That on May 14, 1974, the Court ordered "that the Motion for a stay of discovery, except that relating to the class action determination, be and is Granted . . ."; that said stay order, according to the Court's Memorandum and Order, was based upon the "implications of judicial time and pecuniary economy";

6. That on or about May 15, 1974, respondent Coopers & Lybrand filed a Motion asking the Court to dismiss the class action allegations of petitioners' Complaint; that although said Motion was denied by the Court on July 16, 1974, said respondent filed a similar Motion on or about October 2, 1974, asking the Court once again to dismiss the class action allegations of petitioners' Complaint, which said motion has not to date been ruled upon by the Court;

7. That petitioners' Motion for Class Action Determination, filed on April 9, 1974, and orally argued on June 24, 1974, has also not been ruled on by the Court;

8. That on September 3, 1974, petitioners filed a Motion asking the Court to dissolve the stay order of May 14, 1974, which Motion was denied by the Court on September 23, 1974;

9. That on September 26, 1974, counsel for the petitioners wrote a letter to the Court requesting a conference with the Court and all counsel with respect to any unresolved issues relating to the anticipated ruling on petitioners' Motion for Class Action Determination;

10. That on October 4, 1974, the Court set the case for trial on December 16, 1974;

11. The May 14, 1974, and September 23, 1974, stay orders are not appealable and this Petition is the only remedy which can afford the petitioners the kind of relief sought herein;

Issue Presented

12. The issue presented is whether or not the Court below abused its discretion under the circumstances in staying all discovery, except that discovery relating to the class action determination, until such time as the class action determination is made;

Reasons Why Writ of Mandamus Should Issue

13. The Writ should issue for the following reasons:

(i) The original stay order was based upon the Court's finding that respondent Coopers & Lybrand's "contention is a viable one considering its implications of judicial time and pecuniary economy", but there were no affidavits, testimony, documentary evidence, or any other evidence of any kind to support said respondent's Motion;

(ii) Regardless of whether the Court sustains or denies the class action determination herein, the petitioners will at that time commence full and complete discovery on all issues. Accordingly, the Court's ultimate ruling with respect to the class action determination will not obviate the need for full and complete discovery and, therefore, there will be no saving of "judicial time and pecuniary economy". It will only be delayed, to petitioners' prejudice;

(iv) For the foregoing reasons the issuance of stay orders relating to discovery is not logical and constitutes an abuse of discretion by the Court below;

(v) That since the issuance of the original stay order, petitioners' discovery has come to a complete standstill and that as

a result of petitioners' inability to pursue normal discovery procedures, including depositions, petitioners' case has been and continues to be seriously impaired and prejudiced.

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated, Petitioners, v. Punta Gorda Isles, Inc., et al., Respondents, and Honorable H. Kenneth Wangelin, Judge, United States District Court for the Eastern District of Missouri, Eastern Division, Nominal Respondent.	No. 74-1827

Filed: November 15, 1974

Before GIBSON, Chief Judge, and HEANEY and STEPHENSON, Circuit Judges.

ORDER

It is the view of the Court that petitioner should request a prompt ruling on its motion of April 9, 1974, for an order

determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits, postponing the actual trial date in order to permit necessary discovery.

We are satisfied that the trial court will act in compliance with the views of this Court, and, therefore, we now deny the petition for writ of mandamus.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

ANDERSON, GREEN, FORTUS & LANDER

November 18, 1974

Honorable H. Kenneth Wangelin
Judge, Division 3
United States District Court
United States Courthouse & Customhouse
1114 Market Street
St. Louis, Missouri 63101

Re: Cecil Livesay, et ux v. Punta Gorda Isles, Inc., et al.
Civil Action No. 73 C 517(3)

Dear Judge Wangelin:

In accordance with the November 15, 1974, Order of the court of appeals, I should like to request a prompt ruling on plain-

tiffs' Motion, dated April 9, 1974, for Class Action Determination.

Your Honor indicated on June 24, 1974 during the course of oral argument, that there should be a hearing after the reliance issue is resolved. Accordingly, I also ask that the Court consider this letter as a request for such hearing. I would also like to request that, prior to the hearing, the Court hold a pre-hearing conference to provide counsel with some guidance as to the scope and nature of the evidence to be adduced.

Yours very truly,

/s/ MARTIN M. GREEN

MMG:kg

cc: Veryl Riddle, Esq.

cc: Lewis R. Mills, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

TRANSCRIPT OF HEARING
St. Louis, Missouri

December 30, 1974

Transcript of testimony adduced and proceedings had in the above styled cause before the Hon. H. Kenneth Wangelin, Judge of the United States District Court, for the Eastern District of Missouri, Eastern Division.

Appearances

Anderson, Green, Fortus & Lander
120 South Central, Suite 938
St. Louis, Missouri 63105
by Mr. Martin H. Green and
Mr. Edward Lander for plaintiffs;

Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102
by Mr. Veryl L. Riddle for Defendant Coopers and Lybrand;

Peper, Martin, Jensen, Maichel &
Hetlage
720 Olive Street
St. Louis, Missouri 63101
by Mr. William A. Richter and

Mr. Lewis R Mills for Defendants Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Jones, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Wade, Earl Drayton Farr, Jr. and John W. Douglas.

* * * * * * *

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[3] PLAINTIFF'S EVIDENCE

CHARLES T. TOOLEY,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

Q. Would you state your name please? A. My name is Charles, initial T. Tooley.

Q. Mr. Tooley, what is your occupation? A. I'm an officer at Mercantile Trust Company.

Q. Are you in the stock transfer department of Mercantile? [4] A. I'm in charge of it.

Q. As such, are you responsible for the stock transfer duties of Punta Gorda Isles, Incorporated? A. Yes.

Q. You handle that account? A. They're one of our customer accounts.

Q. You're familiar, of course, with the fact that Punta Gorda made a public offering on May 2nd, 1972, are you not? A. I'm not sure of the date, but I know it was May of '72, yes.

Q. As transfer agent for Punta Gorda Isles, what are your duties, in other words, what do you do? A. We mainly do the work of the corporate secretary, maintaining the records of stockholders, issuing certificates to—stock certificates to purchasers, cancelling certificates representing shares sold by former stockholders, maintaining the records. We prepare labels, certified copies of lists, pay dividends from time to time.

Q. Now, Mr. Tooley, in addition to Mercantile Trust Company there is another transfer agent, is there not? A. On the common stock, yes, Chemical Bank.

Q. Is that Chemical Bank and Trust Company in New York City? A. Yes, 770 Broadway, New York, New York.

[5] Q. Now, with respect to Mercantile's record keeping system on the transfer of all securities of Punta Gorda Isles, does Mercantile keep a microfilm system that permanently records all transfers? A. We do have a microfilm system that records a recap of all of the transactions for a given year. Our computer records are purged at the end of the year and they're reduced to microfilm.

Q. And then the microfilms are kept as permanent records, is that correct? A. That's correct, yes, sir.

Q. Is your microfilm system also kept as permanent records, the transfers made by Chemical Bank on the common stock? A. It would include those transfers because they send advice copies to us for posting.

Q. Now, Mercantile, of course, is located in St. Louis is it not? A. That's correct.

Q. Are those microfilm records kept here in St. Louis? A. Yes they are.

Q. Are they kept at Mercantile Trust Company? A. Yes, sir.

Q. Are you in charge of that department? A. Yes, sir.

[6] Q. And upon appropriate order of this Court, I assume you would make them available, naturally, with all the time and effort that's necessary to go through them and dig them up? A. Yes, I would assume we'd have to have permission from Punta Gorda. We're only an agent in our capacity here.

Q. I understand. Now, sometimes stocks or bonds are bought and sold in what known as a street name, is that correct? A. That's correct.

Q. Do you know what street name means, will tell us for the record? A. Securities registered in the name of a broker which are held in the broker's name rather than being further transferred into the name of the purchaser.

Q. So that your records would only show that they're held in the broker's name in some instances, and not in the customer name, isn't that correct? A. There would be some instances where securities are held for a long extended period of time in the name of the broker, that's correct, or various brokers or nominees.

Q. Or nominees? A. Uh huh.

Q. And we would then have to go to the brokers or the persons handling those transfers to obtain the names of the **[7]**

actual beneficial owners? A. That's right. Our records would not reflect that.

Mr. Green: I believe that's all.

Mr. Richter: No questions, Your Honor.

Mr. Riddle: None, Your Honor.

Examination

By the Court:

Q. Mr. Tooley, as I understand the gist of your testimony, that you did have available records of all transfers of Punta Gorda securities, either debentures or common stock that have occurred through your particular official position, or that have been handled under the supervision of the Chemical Bank in New York City, is that correct, sir? A. Well, Your Honor, I'd have to amend that slightly. We have in our office the cancelled certificates which have been presented to us for transfer in St. Louis. I do not have the cancelled certificates which have been transferred in New York. The Chemical Bank would have those. I receive from Chemical Bank a sheet on a daily basis or on such other time interval as they have transfer showing the certificates cancelled by number, name, prefix and shares, and showing the same information for the certificates issued with the addition of address.

Q. What types of securities, if I may use that broad term, have you handled in connection with Punta Gorda? A. My supervision is limited to the common stock. **[8]** The debentures—there is a debenture issue tied in with this public offering and that is handled by Otto Johnson, another Vice-President there in the bank. However, Bankers Trust Company in New York at 485 Lexington Avenue is the principal trustee on that issue, and our services on the debentures are limited to the cancellation of a certificate, the issuance of a new certificate, preparation of an advice sheet and then we send the new certifi-

cate out to the purchaser and we send the cancelled certificate and the advice sheet to Bankers Trust Company, so on the debentures we have very little in the way of records. We have a copy of the advice sheet.

Q. Well now, is there any fixed relation between the transfer of the common stock and the debentures? In other words, does one indicate the transfer of another, or can they be done independently? A. They're independent, sir.

Q. They're independent, all right. Next question: Do your records indicate the date of the transfer? A. Of the various transfers, cancellation and the issuance, yes, sir.

Q. Do they also indicate the price? A. No.

Q. The price is not shown? A. No, sir.

[9] The Court: I have no further questions. Either one of you gentlemen have anything more?

Mr. Richter: No, Your Honor.

The Witness: Could I just add one point?

The Court: Certainly.

The Witness: To clarify these records, the advice copies which we maintain in the case of the debentures reflect debit entries and credit entries which are then posted on the books at Bankers Trust Company as Trustee for the debenture issue. In the case of the common stock, Chemical Bank makes transfers and sends advice copies to us for posting on our computer. We have a consolidated posting on the computer. However, because of the fact that the transfers pertaining to this particular transaction and the transfers pertaining to other transactions representing normal purchases in sales, are listed on the same sheets. The only identification of the transactions relating to this transaction, the one that's under study here, would be by certificate number. In other words, we would know which certificates were issued on the initial offering to identify those. To identify those

shares we would have to refer back to that certificate number to be sure it was included in that group and then the identity of the transfer can best be obtained from the examination of the cancelled certificates which are filed in chronological order.

[10] Now, the cancelled certificates representing New York transfers would be filed in similar order, but would be maintained at their office, and I believe the examination of the certificates would be easier than examination of the computer records.

The Court: Anything further, gentlemen? May the witness be excused? Thank you, Mr. Tooley.

Who do you have next?

Mr. Green: Judge, at this time I'd like to add a further stipulation into the record, and that is Mr. Mills who represents Punta Gorda has agreed to stipulate for the record that Punta Gorda has a stockholder's list in addition to what information Mercantile Trust has, isn't that correct?

Mr. Mills: I did not say in addition. They do have a stockholder's list.

Mr. Green: That's the stipulation I wanted to get.

The Court: So that I may be fully advised, gentlemen, as I understand what that stipulation is, that the defendant Punta Gorda maintains in its offices or office, a complete list of issuances, transfer, et cetera, of all its stock and debentures, is that right or wrong?

Mr. Mills: They maintain that list through Mercantile Trust Company, Your Honor, which is their transfer agent. Mercantile Trust Company maintains a stock register, stockholder's list.

[11] The Court: The certificate or the security, or whatever you want to call it, has on its face or on its back or somewhere imprinted that the transfer agent is such and such an institution?

Mr. Mills: Yes, Your Honor.

The Court: And let's assume that I buy a debenture from somebody or through a broker or however, and in order to have that issued in my name I must then take the certificate that I purchased, or have my broker do it, and take it down to the Merc or wherever and say here, and they then make the transfer and forward me a similar security in lieu of the one I've traded in, is that correct?

* * * * * * *

CECIL H. LIVESAY,

[12] was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name please. A. Cecil, middle initial H, Livesay.

Q. And where do you live, Mr. Livesay? A. 955 Greenway, Glendale, Missouri.

Q. What is your occupation or profession? A. Chief of Police.

Q. Of what city? A. Glendale.

Q. Are you married? A. I am.

Q. And who is your wife? A. Dorothy Livesay.

Q. Is she here in court with you today? A. She is.

Q. Are you and Mrs. Livesay the two representative plaintiffs in this lawsuit which is being heard today? A. Yes, sir, we are.

Q. And did you purchase at the May 2nd, 1972 public offering of Punta Gorda securities, five thousand dollars face amount

of their debentures and one hundred shares of their **[13]** common stock at eighteen dollars per share? A. I did.

Q. And were those stocks recorded in the name of you and your wife? A. They were.

The Court: A hundred shares of common and five thousand dollars worth of debentures, right?

Mr. Green: Yes.

The Court: All right, go ahead.

Q. And did you make the investment decision basically on behalf of yourself and your wife? A. Yes, I did.

Q. Subsequent to the public offering, did you sell your debentures and common stock at a loss? A. I did.

Q. And was that loss approximately $2,650.00? A. Yes, that's about correct.

* * * * * * * *

[16] Q. Did you, prior to contacting me, obtain a copy of the annual report for 1972 of Punta Gorda Isles? A. Yes, sir, I did.

Q. By that time had you sold your stock, or were you still the owner of—stock and bonds? Did you still own the securities? A. I sold the stock in October of 1972.

The Court: Now, when did you get this financial statement? After that time?

[17] The Witness: Yes, sir.

The Court: All right, go ahead.

Q. And then you started to indicate that you consulted a lawyer, and when was that that you consulted a lawyer? A. May of 1973.

Q. And I, of course, was that lawyer, isn't that right? A. Yes, sir.

Q. And did we have several meetings in May and June of 1973 where we discussed these doubts and concerns that you had about the Punta Gorda prospectus and your purchase of Punta Gorda securities at public offering? A. Yes, sir, we had several meetings.

Q. And did I ultimately agree, and my firm, to represent you in an action on your behalf, your wife's behalf, and on behalf of a class composed of all people who purchased Punta Gorda securities at the public offering? A. Yes, sir, you did.

Mr. Riddle: Please the Court, I understand that this is being tried before the Court, it's a preliminary matter. Those are patent, leading and suggestive questions calling for conclusions.

The Court: I understand, counsel, and the Court regards them in that fashion. You may proceed. It may save a little time.

Q. Mr. Livesay, have you agreed to foot the bill, so **[18]** to speak, for the cost and expenses of this litigation?

Mr. Riddle: Please the Court, I think that even goes farther than a liberal attitude.

The Court: Well, let me say this, and I don't want to be facetious, gentlemen, and I haven't the remotest idea of what the cost of this litigation is going to amount to, and I assume counsel is not asking the witness to give him carte blanche or to sign an open note or anything of that nature.

Mr. Green: Not really.

The Court: I assume—let me ask the question this way: You have retained counsel here to represent you in this matter. Incidentally, when in May, if you can recall, in May of '73, did you first speak with counsel about this matter?

The Witness: Your Honor, just in May of '73. I couldn't give you a date.

The Court: You couldn't tell me early, late or middle?

The Witness: I'm sorry, I could not, Your Honor.

The Court: And as I understand, you're agreeing to, I assume, pay the costs within reason, but you're not saying—are you telling this Court that regardless of what—you're speaking about court costs now, or attorney's fees?

Mr. Green: No, not attorney's fees, I'm talking **[19]** about court costs and expenses for depositions and things of that nature, but not legal fees.

The Court: All right, you may answer.

A. Yes, sir, I have agreed to pay the expenses and the court costs.

Mr. Green: I believe that's all.

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[20] Cross-Examination

By Mr. Richter:

Q. Mr. Livesay, as I understand your testimony, you've agreed with Mr. Green to pay him, or to pay for the expenses of this lawsuit, regardless of how large those expenses will be, is that correct? A. I have agreed to pay for the expenses, yes, sir, that's true.

Q. And you've agreed to do that regardless of whether or not there's any recovery in this case, is that correct? **[21]** A. That's true.

Q. And has Mr. Green advised you that those expenses could be very much greater than the $2,625.00 you lost on this security? A. He's told me approximately what it might be.

Q. What statement has he given you as to the amount of those expenses? A. He said it might be in excess of $5,000.00.

Q. Did he tell you how much in excess of $5,000.00 those expenses might be? A. No, he said that would probably be pretty close.

Q. Have you also agreed to pay him a fee in this lawsuit? A. No, I have not.

Q. Well, you recall when we took your deposition some months ago, do you not? A. I do.

Q. Do you recall what you said at that deposition about a fee? A. Well, I remember how I corrected it. I wasn't referring to his fee. I know the class action suit, that the fee is awarded by the Judge.

Q. Didn't you initially testify, before you had a chance to talk to your counsel, that you had agreed to pay him a fee? **[22]** A. I stated that. I was confused. I knew that wasn't so.

Q. Then after you talked to your attorney at the second session of the deposition, you corrected that testimony, is that correct? A. I did.

Q. Was it your initial understanding that you were going to have to pay Mr. Green's fee regardless of the outcome of the lawsuit? A. I knew I wasn't going to.

Q. You were or were not? A. I knew I was not going to have to.

Q. But you testified just the opposite when I took your deposition. A. I did.

Q. Isn't that correct? A. I did.

Q. Before you filed this suit, did you discuss with Mr. Green on whose behalf this suit should be filed? A. I'm sorry, I don't understand the question.

Q. Well, did you discuss with him whether this should be a suit on your behalf for the $2,625.00 you had lost on this security? A. We discussed whether—yes, whether it would be a class action suit.

[23] Q. Well, did you discuss with him at all whether you should merely sue on your own behalf? A. Yes.

Q. Well, when I took your deposition back in April, April 19th of this year, didn't you tell me that you did not discuss with him whether you should sue alone for your own loss? A. No, I can't recall that. I said—I think I said I don't know how I could just sue on my behalf if indeed there was fraud. Everyone that bought the stock and everyone bought the debentures would be equally entitled to share in this.

Q. What is your current understanding as to whether you could have sued on your own behalf in this case?

Mr. Green: Let me object because that's not the same question. Before I think the question was whether we had discussed that. Now he's saying his current understanding and suggesting that it has changed.

Q. Let me just ask you this: Did Mr. Green—I'll withdraw that question, Your Honor, to obviate the objection.

Did Mr. Green ever tell you before you filed this suit that you had the right just to sue on your own behalf for your own loss? A. I think he did.

Q. Would your recollection in April of 1974 have been **[24]** better than your recollection right now on that point? A. No.

Q. You mean your recollection's gotten better as time has gone on? A. No, I said it wouldn't be any better.

Q. What if your recollection then was different than your recollection now, don't you think your recollection then would have been better than it is now? A. No.

Q. Did you and Mr. Green discuss prior to the filing of this lawsuit the parties who should be sued as defendants in this suit? A. We did.

Q. And did you discuss the joining of the underwriters as defendants? A. It was brought up.

Q. Who brought that subject up? A. Mr. Green said that he would have to make an investigation and see what parties were liable, and he stated that if the underwriters were liable, we would also join them.

Q. And did he later make a recommendation to you as to whether or not the underwriters should be joined? A. He did.

Q. What was his recommendation? A. That they should not.

[25] Q. And did he tell you the basis for that recommendation? A. He said that he would not see that they were liable in any way, and it would seriously damage our case if we did join them.

Q. Before filing this lawsuit, did he tell you that he represented, and did represent at that time one of the underwriters? A. He did.

Q. Did he tell you the basis on which he had concluded the underwriters were not liable? A. Yes, he said there were a group of underwriters and he didn't see how they could have all had this knowledge and to go before a jury and expect all of them to enjoin all of them and how they could have this advance knowledge that the directors of the company had.

Q. Now, you understand that you coming in here and purporting to represent all of the people who purchased the Punta Gorda stock and debentures at the public offering on May 2nd, and possibly May 3rd of 1972, isn't that correct? A. I understand that.

Q. What do you understand your obligations to be with respect to representing all those people in this lawsuit? A. That I pursue the case as vigorously and as fairly as possible and be represented by the very best attorneys I can possibly be.

[26] Q. At the time you filed this lawsuit, did your attorney tell you exactly what investigation he had conducted with respect to whether the underwriters should be joined? A. At the time the lawsuit was filed?

Q. Right. A. He told me about all the investigation he did. I can't recall all of it.

Q. Can you remember anything he told you he did? A. Yes, I can.

Q. What? A. Well, he's made trips to Florida.

Q. Before this suit was filed? A. I can't remember the dates of the trips.

Q. You can't remember whether or not he made a trip to Florida before he filed this suit, is that correct? A. That is correct.

Q. What I'm asking you, and I want you to pay attention to this question: What investigation did he tell you he made with respect to joining the underwriters before this suit was filed? A. He said he made an extensive investigation; in his opinion the underwriters were not liable in any way.

Q. But can you remember one specific thing he told you that he had investigated that led him to that conclusion? A. No, not offhand.

[27] Q. Did he explain to you what would happen after this suit was filed with respect to trying to learn the facts about your claim? A. I'm sorry, would you repeat the question?

Q. Did he explain to you before the suit was filed what would happen after the suit was filed with respect to attempting to learn the facts about your claim? A. I still don't understand——

Q. Did he tell you there would have to be a lot of investigation, formal investigation made under the Court's supervision to try and get facts to try and prove your claim? A. Yes.

Q. And did he tell you that that investigation might reveal many things you did not know at the time you filed that suit? A. No.

Q. Did he tell you that that investigation might establish that the defendant who you did sue were not liable? A. No, he didn't tell me that.

Q. Did he tell you that that investigation might reveal that other people such as the underwriters may be liable? A. No.

Q. He just told you that he had decided that the underwriters weren't liable, and they shouldn't be sued, is that it? **[28]** A. No, he said he made an investigation.

Q. Did he tell you that he decided that the results of his investigation showed that the underwriters were not liable? A. They were not liable, and it would seriously hurt our case if we joined them.

Q. Did he tell you how it would hurt the case to join the underwriters? A. Yes, to just sue—to join everyone that signed their name to it, and to bring everyone into Court and to hear a jury—have a jury stating that everyone had signed their name to this, that we were going to sue them and when they're not liable would hurt our case.

Q. Did he say anything to you about whether or not it was the usual practice by attorneys who handle these types of cases and by plaintiffs who bring these types of cases to sue the underwriters that sold the security?

Mr. Green: Let me object to the implication as to any usual practice. It's a fact that's not in evidence. Are you just asking if I said that?

Mr. Richter: I object to him testifying, coaching the witness here in court, Your Honor. I asked whether he said anything about it, whether that was the usual practice. I very carefully phrased that question that way.

Mr. Green: I noticed that, but I'm objecting because **[29]** it's irrelevant.

The Court: As I've indicated earlier, gentlemen, unless the question is clearly far beyond any possible issue in the case, the Court's going to let the evidence in subject, of course, to the objection. You may proceed.

Q. Do you understand the question? A. I do. I can't remember if Mr. Green said anything about it. I know many times underwriters are joined in the suit.

Q. You knew that at the time you filed this case, is that correct? A. I did.

Q. But you don't recall whether or not Mr. Green discussed what the usual practice was with you? A. I don't.

Q. And did you know that that was done frequently at the time you filed this suit; that is, the joining of the underwriters? A. I don't know the frequency. I wouldn't know if it was a third of the time or half the time, but I know that they are frequently joined.

Q. And you knew that at the time you filed the suit? A. I did.

Q. Let me ask you this: Why did you file a suit as a class action where you could incur expenses substantially **[30]** more than your loss, rather than really suing for the $2,625.00 you lost? A. Well, I know—I know that the expenses can be awarded back to me from the Court on a class action suit, and I would leave it up to my attorney on what the best type of suit is to be filed.

Q. So you left the decision whether to file a class action or individual suit up to Mr. Green? A. Absolutely. It was a joint decision, but I would certainly rely on his advice.

Q. At the time I took you deposition you testified, did you not, that you did not understand it that you could recover on your own deal? A. I can't recall.

Q. I asked you on page 92:

"Question: And are you seeking recovery on behalf of yourself and your wife in this case, even if the class can't recover? Answer: No."

You remember when we went through that discussion?

"Question: You don't want to recover in this suit if the class can't recover, is that correct? Answer: Well, I know this is a class action suit. Question: Well, if it is not a class action suit, are you still making the claim for your own loss, just for you and your wife in that case? Answer: No. Question: If it is not a good class action **[31]** suit, you don't want to recover in this case, is that correct? A. Answer: I don't want to recover."

Now, do you remember that discussion? A. Yes, I do.

Q. Do you remember similar discussion perhaps with Mr. Hennelly and Mr. Mills? A. I do.

Q. Did you indicate at that deposition you did not understand you could have sued on your own behalf?

Mr. Green: Let me object, because if there's such a statement I think it should come from the deposition.

Mr. Richter: I want to ask his recollection at this time.

Mr. Green: Well, if there's a reference to a deposition, I think it should be a specific reference instead of a summary.

The Court: Well, gentlemen, there's two ways to proceed. One is to ask: Did you make this statement, or was this question asked, and did you make the statement?

The other is to lay the foundation in general terms if that statement was made, and, gentlemen, if you're going to get into deposition cross-examination it's fine with me but let me just say this much in fairness to both parties: Where you get into whether or not the question was asked or statement was made in deposition the Court would appreciate **[32]** having the book and page.

Q. Yes, Your Honor. I think I'll go on to another question, I'm about finished, Your Honor.

Did Mr. Green tell you whether or not he discussed representation of you in this case with his client, I. M. Simon, before this suit was filed? A. He said he investigated it.

Q. Did he say he had discussed representation of you in this suit with I. M. Simon? A. I can't recall.

Q. When he told you about his representation of I. M. Simon, did he indicate or did he tell you that this created a conflict of interest between you as a representative of the class and himself? A. No.

Q. As a representative of one of the underwriters? A. No, he said if he—if it did represent a conflict of interest he would rather—he would tell me at that time and rather give me the name of another attorney.

Q. So did you understand from that that it was his position there was no conflict of interest that he had in this case between his representation of you and his representation of I. M. Simon? A. Yes, that there was no conflict of interest.

Mr. Richter: I have no further questions.

[33] **Cross-Examination**

By Mr. Riddle:

Q. You pronounce your name Livesay? A. Livesay.

Q. Livesay? A. Yes, sir.

Q. Sir, you are the Chief of Police in the Village of Glendale? A. Yes, sir.

Q. How long have you held that position? A. Chief of Police for five years.

Q. How old a man are you? A. Forty-one.

Q. And before being Chief of Police, what office or what work did you engage in? A. I was a police officer.

Q. How long have you been a police officer, sir? A. Eighteen years.

Q. You've been a police officer almost all of your mature life then? A. I have.

Q. Have you had any income other than what you have earned as a policeman through those years? A. Yes, investments in property and stocks and bonds.

Q. And the money with which you made those investments **[34]** did that all come from—originally from your salary as a police officer? A. Mine and my wife's.

Q. Have you inherited any money? A. I have not.

Q. And what is your formal education, sir? A. One semester in college.

Q. Your wife work? A. She does.

Q. And what is her salary now per year? A. Ten thousand.

Q. And what is your salary, sir? A. Sixteen.

Q. Is that before the deductions? A. Yes, it is.

Q. In both instances? A. Yes, it is.

The Court: I take it you mean the word "withholding"?

Q. Yes I do, thank you, Your Honor.

Sir, with respect to your present financial position, and I don't intend to delve into it in any great detail, but do you have a bank account? A. I do.

Q. What bank? A. Boatmen's Bank. **[35]** Checking, savings.

Q. Do you do business with any bank other than Boatmen's? A. With savings and loan companies.

Q. What savings and loan company? A. Lafayette Federal, Community Federal, Carondelet Savings and Loan.

Q. Aare all of your accounts in you and your wife's joint name? A. Yes.

Q. Sir, just in general, not asking you to be specific, but what's your present balance in your checking account? A. Checking?

Q. Yes. A. A thousand.

Q. And what is the total of your savings account at the various institutions that you've given us? A. Several thousand.

Q. Give us—— A. Three or four thousand.

Q. They'd all total three or four thousand? A. In savings and loan?

Q. Yes. A. Yes.

Q. Plus a thousand dollars in the checking acocunt, makes a total of about four thousand dollars in cash? **[36]** A. Yes.

Q. In addition to that, what property do you own, sir? A. My house at 955 Greenway.

Q. And is there a mortgage against it? A. Yes.

Q. And what's the amount of the mortgage against it? A. About ten or eleven thousand.

Q. And how long have you owned that house? A. Nine or ten years.

Q. How much did you pay for it? A. Twenty-two

Q. Twenty-two thousand? A. Twenty-two.

Q. Have you made any major improvements to the house? By that I mean in excess of a thousand dollars or in excess of five thousand dollars to it? A. No.

Mr. Green: Just a minute. I want to object to this line of questioning. I think it's really getting to the point where it's so far afield as to be irrelevant. Improvements to his home.

The Court: Well, I previously indicated, let the matter get in. I assume the thrust of counsel's question, and if it's not for this purpose the objection will be sustained, but I assume that this witness has testified that he's agreed **[37]** to pay expenses which can range in excess of five thousand dollars. Now, willingness is one thing and ability is something else. If you're going to any other reason, Mr. Riddle——

Mr. Riddle: There is no other reason, otherwise it would be an invasion of this gentleman's privacy, and I wouldn't purport and attempt to do that.

The Court: All right, go ahead.

Q. Your answer was that you made no major improvements to the house in excess of a thousand or two thousand dollars since you purchased it? A. No, I think the asking price of the house at the time was thirty-five thousand.

Q. Sir, do you have any other property besides your home and what you've told us about in the banks and savings and loan? A. No.

Q. Other than your household goods and household accessories? A. No.

Q. And do you have an automobile? A. Two automobiles.

Q. And what sizes are they? A. Volkswagen and a Ford.

Q. You have children? **[38]** A. I do.

Q. What model is your Ford? A. '70 Ford.

Q. '70 model? A. Yes.

Q. And what model is your Volkswagen? A. '71.

Q. Are there mortgages against those cars? A. No.

Q. Now, sir, are there any mortgages outstanding against any of your household appliances? A. None.

Q. Have you told us all the property you hold? A. All the property, yes.

Q. Do you have any debts other than the nine or so thousand dollars owing on your home? A. None.

Q. Mr. Livesay, I understand your testimony to be that you had a net loss of $2,650.00 from the purchase and sale of these securities? A. I did.

Q. Now, has it been made clear to you by Mr. Green the type of expenses that are likely to be incurred in this lawsuit? A. He made it extremely clear.

[39] Q. Did he make it clear to you the type of expenses that would be incurred if it were allowed, and if this Honorable Court allowed this case to proceed as a class action? A. Yes, he did.

Q. Did he tell you the number of depositions that would be necessary to take? A. He did.

Q. What did he tell you in that regard? A. He said it would probably run three thousand dollars.

Q. No, the number of depositions. A. The number. Well, he said he wants to—he wants to take these depositions. He's extremely eager and he didn't name the number, but I know he wants to do it with the directors, the auditors—I mean the accountants, with everyone he possibly can.

Q. Did he tell you that it may involve taking as many as fifty depositions? A. He didn't say the number. He said there would be considerable depositions to be taken.

Q. Well, he did mention all the individual defendants, as well as anybody else throughout the country that might have some knowledge about this case? A. Yes, sir.

Q. Sir, did you inquire as to what the price of a **[40]** deposition, one deposition would be? A. No.

Q. In the course of this case so far there have been some depositions taken. Have you been submitted a bill for those charges? A. Yes.

Q. Have you paid them? A. I have.

Q. Did you get an idea from those charges about what a deposition might be? A. Yes.

Q. How much have you paid by deposition charges so far? A. A deposition charge for sixty dollars.

Q. Sixty dollars? A. Sixty.

Q. That's just you and your wife's deposition? A. I paid sixty dollars for deposition charges.

Q. Sir, have you been told by Mr. Green that it will necessitate his traveling to Florida, New York, California and other places throughout the United States to take these depositions? A. He has advised me of that, yes.

Q. Do you have an agreement with him that you will pay his travel expenses and lodging and boarding expenses for all those trips? **[41]** A. I have.

Q. Sir, have you paid for Mr. Green's trip to Florida? A. For two trips to Florida.

Q. Two trips to Florida. You have paid for those? A. I have.

Q. By check? A. I have.

Q. And what do they total? A. It was four trips, and filing fees and deposition, and it comes to $1,234.00.

Q. One thousand how much? A. Two hundred, thirty four dollars.

Q. To date? A. Yes.

Q. And there weren't any depositions taken in Florida? A. No.

Q. Sir, based on the expenses for those trips alone, where depositions weren't even taken, have you done some calculating in your own mind as to what costs might be involved to you for the taking, of example, of depositions that might last for as long as three weeks in Florida? A. I have, and I've talked to Mr. Green about it.

Q. And have you reached any conclusion as to what it might cost you, or will likely cost you to pay for, say, up to three weeks of depositions in Florida?

[42] Mr. Green: Just a minute, I want to object because he's assuming that his named plaintiff has to pay all of the costs himself. There will be evidence that there are other co-plaintiffs who have agreed to share in these costs, so when he says has this named plaintiff, does he understand that he will have to pay them, that's assuming a fact that is not in evidence, and there will be evidence of the other co-plaintiffs who have retained me, as to their willingness to share these costs and I want the Court to know that in advance. So I'm objecting to the assumption that Mr. Riddle's making which is not in evidence that this named plaintiff alone will have to bear the burden of all of these costs.

Mr. Riddle: Then I think that's very helpful and that casts a different light on this lawsuit.

Mr. Green: That's right.

Q. Do I understand that there are other people who are helping you subsidize this lawsuit? A. There has been—there's been at least four parties I know in addition to myself that have joined in it. I know the name of another individual that is going to help pay the expenses, yes.

Q. Can you give us the names of those people who are going to join in? A. Joe Morrissey is one.

Q. Where does he live? **[43]** A. He lives here in the St. Louis area.

Q. And who else? A. I know there's an attorney from—I believe he's from the west coast.

Q. An attorney from the west coast is going to join in with you? A. He is.

Q. Have you talked with the attorney from the west coast? A. I have not.

Q. Has he made an offer to contribute to the expenses of the lawsuit? A. I don't know. I just know of Mr. Morrissey has offered to contribute to the expenses of the lawsuit. He had a considerable loss.

Q. What did Mr. Morrissey say he would contribute, how many dollars and cents? A. He talked to Mr. Green.

Q. You haven't talked to him? A. I have not.

Q. What do you understand he's pledged by way of funds for this suit? A. I don't know what his arrangement is, I don't know.

Q. Then do you know whether or not he's offered to pay a single penny? **[44]** A. Yes.

Q. And how do you know that? A. Mr. Green told me so.

Q. What did Mr. Green tell you that he would contribute? A. That he would share in the expenses.

Q. To what extent? A. I don't know.

Q. Then is it your testimony to the Court that you don't know whether he'd pay a penny or a dollar or a thousand dollars? A. Well, he said he would share in expenses to pursue this lawsuit.

Q. Well, sir, sharing can be all the way from one to a hundred percent I take it, is that your understanding of it? A. Well, if he shares in it——

Mr. Green: Let me object, I think it's getting highly argumentative. He's testified as to what he knows and these questions are now just simply baiting the witness and arguing with him about this stuff.

The Court: Well, I don't know whether the witness is being baited or not, but let me get the situation clear as far as my understanding of this testimony here today is concerned.

Mr. Livesay has testified under oath that he is prepared to foot the bills and he's been examined at length **[45]** on his ability to foot the bills. It now develops that there are other people who Mr. Livesay—let me ask you this much: Have you met or discussed this litigation with any of these four or five other parties, or however many there may be, Mr. Livesay?

The Witness: No, sir, I received some correspondence from other individuals and I forwarded this information to my attorney, Mr. Green, but I have not spoke——

The Court: In other words, what I'm asking about, and I'm trying to shorten this matter if I can, gentlemen; you haven't talked, we'll say to Mr. Morrissey, who lives here in the St. Louis area; you haven't been to him and say, Now, look, it's costing me a thousand dollars or twelve hundred already, are you going to pay me part of that, or are you going to pay that much in the next bills, or—in other words, as far as any written agreement in writing which would constitute a promise to pay? You understand what I'm talking about?

The Witness: Yes, sir, I do.

The Court: You don't have any personal knowledge of that?

The Witness: I do not.

The Court: All right, go ahead. Let's take about a ten minute recess, gentlemen.

(Recess.)

[46] The Court: You may proceed.

Q. (By Mr. Riddle): In addition to the cost that Mr. Green explained to you that would be incurred in this suit, were you told that if you lost the lawsuit that the cost could be assessed against you in addition to those that you had advanced? A. Yes, sir, I was told that.

Q. Was any figure given you as to what those costs could potentially be? A. No, he said it could be substantial.

Q. Substantial? A. Yes.

Q. Do you understand that to be in excess of ten thousand dollars? A. No, I wouldn't think it would be that much.

Q. You think it would be as much as five thousand dollars? A. Yes.

Q. That would be five thousand dollars in addition to the five thousand dollars you'd have to advance. A. Pardon me?

Q. That would be five thousand dollars risk in addition to the five thousand dollars that you thought you might have to advance. A. I know it could run that much.

[47] Q. Or a total of ten thousand. A. I know it could run that much.

Q. Well, sir, do I understand your testimony to be that your net loss in this case was $2,650.00? A. It was.

Q. What do you understand that you and your wife, as plaintiffs in this lawsuit, what do you understand the maximum amount of a judgment is that you can recover? A. My actual losses, plus expenses involved in pursuing this case.

Q. Sir, let me see if I understand what you say. Do you understand that the judgment could be rendered in favor of you? Do you understand that would be your actual loss which was the $2,650.00 fee? A. Plus the expenses involved.

Q. Do you understand that the expenses involved would be only reimbursing you for expenses that you had paid out? A. Yes.

Q. So then is it your understanding that the maximum amount that you and your wife could hope to gain in this lawsuit would be the $2,650.00? A. That's correct, I understand that.

Q. Now, is it your position, and are you representing to this Court that you are agreeable to gambling up to **[48]** $10,000.00 in order to recover a maximum of $2,650.00? A. Well, I think you put it very strongly. I don't think it is a gamble. I was very upset about it, and I'm going to pursue it, but I don't consider it a gamble. First of all I think we're going to win this suit and I don't consider it a gamble, and——

Q. What do you consider it to be? You're putting up at least a maximum of $10,000.00 as against getting $2,650.00. You don't consider that a gamble of sorts? A. Well, I know I'm taking a chance to lose more than I stand to gain, but again, I don't consider it a gamble.

Q. Now, Mr. Livesay, have you reached an agreement with Mr. Green as to how he would be compensated? A. How he would be compensated?

Q. Yes. A. Yes, I have.

Q. What is that amount? A. He would be awarded the fees by the Court. If he loses the case there would be no fee.

Q. You have no commitment to Mr. Green to pay him for his services? A. None whatsoever.

Q. Do you have an understanding with Mr. Green that if he were to succeed and be awarded a sizeable attorney's fee that any part of that would be paid to you? **[49]** A. None.

Q. You don't have any such agreement? A. Do not.

Q. Nor understanding? A. No.

Q. Now, have you purchased any other stock or any other securities in the past? A. I have.

Q. Through the same broker? A. Yes.

Q. And what's the broker's name? A. Ben Soffer.

Q. And he's with G. H. Walker and Company? A. No, he's with H. E. Edwards. I now have an account with G. H. Walker.

Q. Now, what are the size or number of the purchases that you've made of stocks or securities? A. I think I said in a deposition that over the years it would be between seventy-five and a hundred.

Q. Thousand? A. No.

Q. Seventy-five and a hundred different purchases? A. Separate purchases.

The Court: Transactions?

The Witness: Yes, sir, Your Honor.

[50] Q. And you don't hold any of those securities now? A. Yes, sir, I do. When you said before about property I thought you was talking about real estate. I used to own some rental property.

Q. What securities do you own now? A. I own a hundred shares of IBM. I own two hundred shares of Sperry-Rand. I own two hundred shares of Merck Drug.

Q. Of what? A. Merck, M-e-r-c-k, Drug. I own five thousand dollars debentures of Greyhound Computer. I own four

thousand dollars in debentures in Liberty Leasing. I own five thousand dollars of Booth Debentures, fifteen hundred shares approximately of American Realty Trust and their warrants, fifty shares of Michigan Mobile Homes. I believe that's it.

Q. Are they all in the account that you now have with G. H. Walker? A. Yes, sir.

Q. What's the value of that account as of today? A. Well, I have also some money just in my account that's just sitting there, between sixty to seventy thousand dollars.

Q. Is that what the worth of all of your assets in that account is today? A. Yes, sixty, seventy thousand dollars.

The Court: Let me ask a question here, and you **[51]** may be more experienced than I am in that area, be able to advise me, but as I understand it, there are different kinds of accounts. One kind is where you call your broker up and say buy this, or sell that, and then there's another type of an account which I believe they call a discretionary account, is that the word? Where you just say here's "x" dollars and you manage it for me. Is this account one over which you have control and order your broker to do this or that, or the other, or is it an account where the broker makes the investment and just lets you know what's happened?

The Witness: No, sir, Your Honor, I make all the decisions.

The Court: All right, go ahead.

Q. And you have on all of these purchases? A. Every one of them.

Q. You only use a broker as your agent for buying and selling? A. Yes, sir.

Q. How long have you been buying and selling stock in the fashion you've described? A. Since 1961.

Q. And have you been successful? Have you made gains through those years? A. I've had some losses, I've had some gains. '74—this was a good year.

[52] Q. '74 was a good year? A. Yes, sir.

Q. Have you gained in more years than you've lost? A. Yes, sir.

Q. You made all those decisions on your own? A. Absolutely. I like to, especially now, but when I first started out I listened to a broker much more than I did now, but now I make all the decisions on my own.

Q. Sir, I'm not sure that the record is entirely clear on this. I believe it needs to be. Is your commitment to this Court unconditional that you will pay the expenses necessary if this were to be allowed to proceed as a class action? A. Would you repeat the question?

Q. Is your commitment to this Court that—and is it unconditional that you personally will be responsible for all of the expenses that are incurred? A. It is——

Q. In this action, if it goes forward as a class action? A. Yes, that is my commitment, that I will bear the expenses.

* * * * * * *

[63] Q. Sir, the record may not be clear on this, but I want to ask you a few questions and I'll make it just as short as I can. At the time that you were discussing the filing of this suit with Mr. Green did you tell him you wanted to bring a class action? A. We talked about which would be the best and I said that I did want to bring a class action, yes.

Q. Were you told that you had the option of bringing **[64]** a suit in your own name, or that you could bring it as a class action? A. Yes.

Q. You were told that you had that option? A. Yes, I was.

Q. Sir, you remember when your deposition was taken back in May of 1974? A. I do.

The Court: What page are you on?

Mr. Riddle: Page 99.

A. I do.

Mr. Richter: Volume II.

Q. Volume II, top of the page. You remember this question being asked you, and these answers being given:

"Question: Well, do you understand that you could have sued on your own? Answer: That I could have sued on my own? No, I would think it would have to be a class action suit. Question: Why do you think it would have to be a class action suit? Answer: Well, because there were a number of other shareholders. Everyone who purchased this read the same prospectus and got it at the same price with probably the same information. Question: You don't think you could have gone into Court by yourself and sued? Answer: No."

Do you remember those questions and those answers **[65]** being given? A. I remember the answers.

Q. You remember this question being asked you, and this answer being given:

"Question: Could you tell me in your own words who you think is in your class that you represent in this lawsuit? Answer: All the individuals that purchased the stock, and the debentures that particular date at that public offering." A. I remember that.

Q. Sir, what is your testimony here today? Is it your view here today that you could have filed this suit in your own name without it being a class action? A. Yes, I knew it.

Q. At all times? A. Yes. You know, I was confused by the questions, but I knew that you could and I know that even if

you don't, if it's not a class action suit, that you can proceed on your own afterwards. Yeah, I knew it.

Mr. Riddle: I believe I have no further questions.

The Court: Mr. Green?

Redirect Examination

By Mr. Green:

Q. Mr. Livesay, Mr. Riddle asked you some questions about your home, and he asked you the amount of the mortgage, which I believe you said was ten or eleven thousand dollars, **[66]** and I believe he asked you what you paid for the house, which I believe you testified was twenty-two thousand dollars, is that correct? A. Yes, it is.

Q. What is the present market value of your home? A. Fifty thousand.

Q. So would you then have forty thousand dollars equity in your home? A. Yes, sir, I would.

Q. And that would constitute part of your overall assets? A. Yes, sir, it would.

Q. Mr. Livesay, prior to your retaining me to represent you and the punitive class in this case, we have been friends for in excess of some ten or twelve years, isn't that correct? A. Yes, sir, we have.

Mr. Green: No further questions.

Mr. Richter: Nothing further, Your Honor.

Mr. Riddle: Nothing further, Your Honor.

Examination

By the Court:

Q. Mr. Livesay, have you talked to any of these other people personally who have bought this original debenture and stock?

A. Some people—I don't know if they're the ones—some people have corresponded with me and written me letters, **[67]** and some people have called me on the telephone and when they do this I refer them to Mr. Green.

Q. Well, my question was: In other words, have you ever eye-balled anybody or shaken hands with them or discussed with them who bought this same new issue at the time you did? A. I understand, Your Honor. No, I have not.

Q. Have you ever been involved in any class action litigation prior to this lawsuit, or what purports to be a class action or is requested to be? A. Yes, sir, I have.

Q. In other words, when did you first learn in point of time about class actions? A. Well, you know—I've known about class actions for—since I've been reading the Wall Street Journal, but once I bought some——

Q. Reason I asked, you seemed to have some expertise along that line. I understand you're not a practicing lawyer? A. No, sir.

Q. But you have indicated by some of your answers that you understand opt in and opt out, and whether you can bring another lawsuit and whether you can't, and things of that nature, so it may be a matter of some interest to you, is that correct? A. Yes, sir.

Q. And you were aware of class actions prior to the **[68]** time that you discussed the matter with Mr. Green, is that correct? A. I was aware of class action.

Q. Where was your class action that you were involved in brought before? A. It was against Revenue Properties.

Q. In what court? A. In Boston.

Q. In Boston? A. Yes, sir.

Q. And that was handled in the Federal Court in Boston? A. Yes, sir, it was.

Q. Was it handled by a Boston attorney? A. Yes, sir.

Q. Was it declared to be a class action? A. It was.

Q. Was it settled or did it proceed to trial? A. It proceeded to trial.

Q. And you testified in the matter? A. No, sir; no, sir. I was just a shareholder in it, I just bought the same stock.

Q. Were you the plaintiff or a member of a class, is what I'm trying to get to? A. Yes, sir, I was just a member of the class, nothing else.

[69] Q. Do you have any knowledge of how the people who correspond with you got your name, or how they happened to write you? A. Yes, sir.

Q. Well, can you tell me what it was? A. They read it in the newspapers or saw it—heard it on a news broadcast, and it was in the Wall Street Journal too, Your Honor.

Q. This lawsuit—the fact that this lawsuit was brought was in the Wall Street Journal, is that right? A. Yes, sir, it was.

Q. Now, I want to ask you this question, and I certainly don't want to disturb your relationship with Mrs. Livesay, but you have indicated some firm commitments here on these costs, and I am not taking the position that I'm trying to collect them or anything, but while we're on the subject, you have also testified that practically all your holdings, stocks, C.D.'s, and buildings and loans, property, et cetera, are jointly held by you and your wife, is that correct? A. Yes, sir, that is correct.

The Court: Well, I just want you gentlemen to know that as far as I understand the law, he can only commit himself as to what he's got in his own name and committing Mrs. Livesay may be another proposition. I'm not suggesting **[70]**

that she should or shouldn't, but I wanted that to be clear in the record. I have nothing further, gentlemen.

* * * * * * *

[72] **Recross-Examination**

By Mr. Riddle:

Q. As you sit here today, Mr. Livesay, without prejudicing anybody's position, would you be inclined to take your net loss and forget about this lawsuit as opposed to pursuing it as a class action? A. Pardon me?

Q. As you sit right here today would you be inclined **[73]** to accept your net loss as opposed to pursuing this cause of action as a class action? A. I would be opposed to that. I think that Mr. Green received a phone call to that effect.

Q. What you're telling the Court is if some greenback is placed on this desk in front of you that wholly compensated you for your loss, that you would refuse to accept it? A. That's true.

Mr. Riddle: All right.

The Court: Anything else, gentlemen? One thing, gentlemen, for the record that the Court's concerned about. I take it that the proposed class is only those who purchased new issue? In other words, the thrust of my question is: Assuming, arguendo, without deciding, that this was declared to be a class action, would we wind up with more than one class? Because it's quite obvious from the testimony here that the class of those who might have purchased ten days, two weeks later, other than the original, might be in a different position legally.

Mr. Richter: Paragraph 4 of the stipulation, Your Honor.

The Court: Well, I haven't got a chance to read it all, but that takes care of it?

Mr. Green: Yes, we've agreed there's only one class for those who purchased in the two-day period of the [74] public offering.

The Court: Now, gentlemen, the Court's not in any hurry at all. We've got all afternoon. Can you give me some idea of how much further testimony there will be?

Mr. Green: Yes, I can. The remaining witnesses will be Mrs. Livesay and I will testify and that's it.

The Court: Can you give me any information as to whether you gentlemen will have testimony?

Mr. Richter: Your Honor, we will not put on any witnesses. Our further presentation will consist only of cross-examination.

The Court: I assume then we will probably be able to terminate this hearing today, is that correct?

Mr. Riddle: I'm sure that's right, Your Honor.

Mr. Green: No questions, Your Honor.

(Discussion off the record.)

The Court: May the witness be excused?

Mr. Green: Yes, he'll remain here for the hearing.

The Court: Thank you, sir.

DOROTHY LIVESAY,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Green:

[75] Q. State your name and address please. A. Dorothy Livesay, 955 Greenway, Glendale, Missouri.

Q. And Mrs. Livesay, you are the wife of Cecil Livesay, who just testified and you are named co-plaintiff in this case, is that correct? A. That's correct.

Q. And you have heard all of Mr. Livesay's testimony with respect to—in connection with this hearing, have you not? A. I have.

Q. Now, Mrs. Livesay, you have heard the issue raised with respect to your attitude towards the commitment that Mr. Livesay has made to pay the cost and expenses of this litigation. Do you share his commitment? A. Yes, I do.

Mr. Green: No further questions.

Cross-Examination

By Mr. Richter:

Q. Mrs. Livesay, did you have any meetings with Mr. Green prior to filing this lawsuit? A. Yes, I did.

Q. Did you take any part in the decision of whether this suit should be filed on your own behalf, or on behalf of a class? A. No, I did not.

[76] Q. Did you take any part in any decision as to whom should be joined as defendants in this lawsuit? A. No, I did not.

Q. Do you have an understanding who decided who should be joined as defendants in this lawsuit? A. Yes.

Q. What is your understanding as to who decided that? A. I understand it was between my husband and our attorney.

Q. Were you given any recommendation as to whom should be joined in this lawsuit? A. No, because I left it all up to my husband.

Q. Were you told before this lawsuit was filed how much it could cost you? A. I think it was mentioned, but I really don't know if it was before.

Q. You don't remember whether there was any discussion or not, is that right? A. No, I don't.

Q. Did you agree before this lawsuit was filed to pay the expenses of the lawsuit regardless of whether you won? A. I did.

Q. And who did you agree with? A. My husband.

Q. Did you tell Mr. Green that you would pay the expense **[77]** of this lawsuit before it was filed regardless of who won? A. I don't recall.

Q. When you told your husband you'd pay the expenses, did he tell you how much they might be? A. I don't remember if he told me at that time.

Q. Has anyone told you after this lawsuit started how much the expenses of it might be? A. I've heard a figure what it might be.

Q. And what figure have you heard? A. Around five thousand.

Q. From whom did you hear that figure? A. I believe I heard it from both my husband and my attorney.

Q. Is it based on that five thousand dollar figure that you just testified that you're agreeable to have your funds used to pay the expenses of this suit? A. No.

Q. If the expenses were twenty-five thousand dollars would you be willing to pay that? A. I'd be willing to go along with whatever my husband thought was the thing we should do.

Q. That's not my question.

The Court: She's answered it.

Q. Would you be willing to pay twenty-five thousand dollars if you lost this lawsuit? **[78]** A. If my husband said that we should, yes.

Q. Now, Mrs. Livesay, do you know anything more about what this suit is about than you did when we took your deposition? A. No, not really.

* * * * * * *

[84] Q. You did not read the prospectus? A. No.

Q. And did you participate with your husband in making the decision to buy? A. No.

Q. You left that up to him entirely? A. That's correct, that's correct.

Q. So you relied on your husband? A. That's correct.

Q. Now, did he discuss the fact that he was thinking about selling the Punta Gorda securities? A. He mentioned he might sell it, yes.

Q. Did he tell you why? A. He was losing money.

Q. Did he give you any other reason? A. Not that I recall.

Q. Did he tell you at the time that he was thinking about selling the stock, that the prospectus didn't tell the truth? A. I don't know, I don't think it was then. I don't know when it was.

Q. No—on about the time that he sold the stock did he tell you that the prospectus did not tell the truth in it? A. I don't know if it was at that itme.

[85] Q. Do you remember when your deposition was taken? A. Yes.

Q. This is on Page 30. Do you remember this question being asked you and this answer given:

"Question: Did your husbnd say anything to you about the prospectus being incorrect before he sold the stock?"

And then Mr. Green said: "Same objection, and the same instructions to Mrs. Livesay. In other words, that she is not to answer it because it constitutes privileged information."

And then the question by Mr. Richter was as follows, and you remember this question:

"Question: Mrs. Livesay, when did you first obtain any information that the prospectus might be incorrect?

Answer: He mentioned——

Mr. Green: Just a minute.

Mr. Richter: I asked you when you first obtained this information."

And your answer: "I don't recall."

And this question, this answer being given:

"Do you recall whether it was before or after your husband sold your Punta Gorda securities? Answer: Before."

Do you remember those answers?

A. I remember them but I was confused at the time.

Q. You were confused then?

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[87] **MARTIN M. GREEN**

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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Direct Examination

By Mr. Lander:

Q. Would you state your name, Mr. Green? A. Martin M. Green.

Q. You're a member of the law firm of Anderson, **[88]** Green, Fortus and Lander? A. Yes.

Q. What is your background as far as how long you've been practicing law? A. I've been practicing law in St. Louis for sixteen years, and I'm a member of the highest Court of this State and the United States Supreme Court and I specialize in securities litigation.

* * * * * * *

[92] Q. Would you list the possible other defendants that you considered? A. Yes, I considered as other possible defendants the lead underwriter in this case, A. G. Edwards. I considered joining the law firm of—I think it's Farr, Farr and somebody else, who's counsel to Punta Gorda Isles. I considered the possibility of joining the law firm of Peper, Martin who was counsel to A. G. Edwards. I considered the possibility of joining another accounting firm, I can't recall the name, who I believe to have been involved in doing some of the accounting in this matter, other than Lybrand. I considered the possibility of joining a firm of engineers that were involved in much of Punta Gorda's work and I ultimately reached a conclusion as to who I felt should be joined in this case.

Q. Do you care to give the Court your reasoning for not including other defendants? A. Yes, while the——

The Court: Well, unless you want to burden the record with that, gentlemen, I'll take his decision at face value as far as he's concerned. If you gentlemen want his **[93]** reasoning in the record, well and good, but——

Q. They could cross-examine him if they want to get into that then, Your Honor.

Mr. Green, do you represent other individuals or businesses that would be members of the class if that determination were to be made by the Court?

A. Yes, in addition to representing the Livesays, subsequent to the filing of this lawsuit, I have been retained by other individuals to represent them with respect to their losses arising from the public offering, Punta Gorda.

Those individuals are the following: Mr. and Mrs. Joseph Morrissey, who live in—who are neighbors of mine and have

been friends of mine for some twenty-five years. They called me. They sustained a loss of $140,000.00. They had purchased a quarter of a million dollars worth of the debentures and two thousand shares of the common stock. They asked me to represent them and indicated a willingness to share in the payment of any costs and expenses. These are two people who are—very substantial wealth, they're millionaires, and have indicated that, don't worry about the costs, we'll help out with them if you need any help.

I have been retained to represent a fund in Los Angeles called The Shareholders.

Q. Capital? A. Capital Fund. They sustained losses in excess of **[94]** half a million dollars, and while they would not be a suitable class representative because they're not individuals, they have agreed to share in the costs if they were called upon to do so.

I have been retained to represent a lawyer named Nichols in St. Louis and his wife, Harry Nichols, who sustained a loss of approximately $5,000.00 on his purchase of $10,000.00 worth of the debentures at this public offering.

I have been retained to represent a company in Dallas called Regal Capital Company through their lawyer, a Mr. Rosenberg from Dallas. Regal Capital is owned by an individual and he sustained a loss of $18,000.00.

I have been retained to represent a Mr. David Kleg and his wife and child, who live in Salt Lake City, and they sustained a loss of—I believe $50,000.00.

Q. Are there others? A. I was asked to represent a man in Maryland, but he would not be part of the class because he bought his securities quite a bit before the public offering, and so I couldn't represent him, and I'm trying to think if there are any others. Seems to me that that's the extent of the others who have asked me to represent them.

Q. In the event that class action determination is not granted, would the other clients that you represent, would you intend to file separate suits on their behalf in **[95]** different districts. A. Well, if it could be avoided with respect to the local people who lose money in the underwriting, I would probably ask leave, and I really haven't made a final decision on this yet; leave to join them into this case. With respect to the non-St. Louis funds and individuals, I have specific instructions and suits will be filed in those cities with local counsel.

* * * * * * *

[103] Q. How long have you represented I. M. Simon before you filed this lawsuit? A. I think I represented them for the first time in 1968 or '69.

Q. And have you continued to represent Simon since filing this lawsuit? A. Yes.

Q. Approximately what percentage of your time have you spent in the year and a half approximately since filing this lawsuit on matters on behalf of I. M. Simon? A. Not too much. I would estimate maybe two or three or four percent of my time. I represent them really in a perfunctory way now with respect to some litigation that **[104]** they're involved in in other cities and I'm sort of the local man to provide them with the facts of the cases as they develop.

Q. You, in effect, supervise their out-of-town litigation? A. I don't supervise it, I receive information. The real work is——

Q. Do you coordinate it? A. Yes, that's correct.

Q. And you do handle their local litigation, do you not? A. Yes, I do.

Q. Do you render business advice to them in connection with their legal problems? A. Yes, I do, from time to time.

Q. Could you be considered their outside general counsel? A. Well, together with Bryan, Cave I suppose I could. We're

both—we both represent them in different matters from time to time. I would say probably I do more of the work for this firm than Bryan, Cave.

Q. And is I. M. Simon a substantial and valued client of your firm? A. In terms of dollars and cents, no. They're valued, yes. In terms of financial value, no.

Q. Over the years they have not been a substantially valuable client? A. Yes, in 1969 and '70 I would say they were more **[105]** valuable financially to me then because they were doing some underwritings and I was doing the legal work. At the current time, no.

Q. Wouldn't you expect in the future, providing the country doesn't completely go out of business, that they will continue to be a substantial and valued client? A. I would hope so.

Q. Exactly what investigation did you make of this lawsuit prior to the time you filed it? A. As I said, I read numerous volumes and works to make sure that I fully understood the significance of the so-called accounting and environmental problems that were confronting me.

* * * * * * *

[108] The Court: Counsel, is the thrust of all these questions having anything to do with the Simon matter?

Mr. Richter: Yes, Your Honor.

The Court: Well, I have no prejudgment about the matter in any way at this time, but assuming, arguendo, that he should have sued Simon, does his intent or whether he had an intent make any difference?

Mr. Richter: Well, Your Honor, you could take the position that on the surface there is a basic conflict of interest.

The Court: I understand that, but does his intent—in other words, the questions you're asking him now is what he's reviewed prior to that time and all this and that and the other,

and I'm not saying he was right or wrong, that's a matter that has to be decided, but the thing I'm getting at is, as a practicing lawyer, whether or not there's a conflict as far as I'm concerned. Of course, if a man openly intends to do something that involves a conflict, well and good. And, of course, intent is proven by acts, but I don't think that a lawyer's intent is one of the basic elements of a conflict. If there's a conflict there there's a conflict there. His knowledge may have something to do with it.

[109] Now, I may be wrong, maybe you have to have intent.

Mr. Richter: No, Your Honor, I think we certainly take the position just on the face of it there's a conflict, but we want to go further and develop the underlying facts with respect to that conflict.

The Court: All right. Well, let's get into them instead of what this gentleman's read.

Mr. Richter: Well, Your Honor, I think his prior investigation is material to the question of his not joining the underwriters in the case, and we don't know how this evidence is going to come out, but we think it should be in the record and we would have anticipated that Mr. Green would have put it on. He didn't. We think it's incumbent——

The Court: Well, go ahead and get into it then.

Mr. Richter: We think it's important that what we expect and hope to be a denial of class action certification will be supportable on the whole record in addition to the other matters that have already been developed.

The Court: You may proceed.

Q. Did you talk to Mr. Briloff before filing the suit? A. No, I've never talked to him.

Q. Have you retained in your files materials which you read before filing the suit? A. I believe so.

Q. Now, did you conduct any investigation apart from **[110]** your reading? A. Yes.

Q. And tell me each person that you talked to in conducting that investigation. A. The primary person that I interviewed was a Robert A. Rosenthal. He is a Vice-President of Drexel-Burnham and Company who, at the time of this underwriting, was the syndicate man at I.M. Simon and Company and I questioned him about I.M. Simon's involvement in the underwriting, the extent of their investigation, if any; what he knew about A.G. Edward's participation in this underwriting. Well, there were numerous interviews with him. I talked to him at some length prior to filing this suit.

Q. What did he tell you about I.M. Simon's investigation in connection with this underwriting? A. He said that their investigation in this case was the same type of investigation that occurred in every other underwriting that they had ever been involved in, as minority underwriters. In other words, as compared to being the lead underwriter.

Q. And what was that? A. And that they left it up to A.G. Edwards and their counsel to protect their interest in this underwriting because A.G. Edwards was the principal underwriter.

Q. And what did he tell you about—excuse me, were **[111]** you finished? A. Go ahead, I'm sorry. I really basically finished the answer to that question.

Q. And you said you talked with him about A. G. Edwards' participation. What did he tell you about A. G. Edwards' participation? A. Well, he told me that he felt that in his opinion that they had done everything possible to find out that the prospectus and registration statement were accurate and correct.

Q. That Edwards had? A. That Edwards had, and that he knew some of the—he knew the law firm for A.G. Edwards, and had high respect for them. We sort of together discussed that, and that they were very competent, and that I believe as I

recall that there had been what is known in the industry as a due diligence meeting which he and some others attended in St. Louis where they received information about Punta Gorda, and to some extent relied upon that.

Q. Did he tell you what he understood Edwards had done in connection with his statement that Edwards had done everything possible to investigate in connection with the underwriting? A. This has been about two years ago—just really just expressed confidence that in his opinion, once again, **[112]** that if there was indeed a fraud in this prospectus, that in his opinion A.G. Edwards was clean, and that it would not have participated in it, and to his knowledge made a suitable investigation.

The Court: Well now, as far as this due diligence meeting was concerned, do I understand your testimony to be that it was your information that both the representative of A.G. Edwards and of I.M. Simon were participants in that meeting?

The Witness: As I recall, representatives of all the St. Louis based underwriters were present.

The Court: That would include Edwards and Simon?

The Witness: Yes.

The Court: All right, go ahead.

The Witness: This is, to the best of my knowledge. I am pretty sure that was what was said to me.

Q. So basically you relied on Edwards' reputation in having done an adequate due diligence investigation? A. I would say that's true to some extent, yes, and I believe that others in the firm at I.M. Simon, he indicated had been in touch with A.G. Edwards in connection with finding out how many shares they would be given in the underwriting and things of that nature, and they were satisfied that at least they felt it was a clean deal.

Q. Did you talk to anyone else, other than Robert **[113]** Rosenthal? A. Now, I spoke to a Mr. Carter Lewis. Carter Lewis was at the time of this underwriting the——

Q. Before filing the suit? A. That's what I'm getting ready to say, it was either just before I filed the suit, and then again after I filed the suit, because he asked me to send him a copy of the Complaint, which I did, and that would, of course, tell me that I spoke to him at least once after suit was filed. I called him a third time and he indicated that Mr. Mills was his lawyer and at that point I then did not question him any further.

Q. What did Mr. Lewis tell you? A. He felt that there was —he was shocked, and I read him excerpts from the prospectus——

Mr. Richter: Excuse me, Your Honor, I move to strike "he was shocked". I asked what Mr. Lewis had told him.

The Court: Overruled.

A. He said "I'm shocked," is what he said to me. "Frankly," he said, "I'm shocked."

I read him excerpts from the prospectus. He did a lot of—he asked me a lot of questions. He indicated he was retired from A. G. Edwards at the time, so that might help with the exact time that I questioned him. And when I read him excerpts, his comment was: "You mean to tell me **[114]** that that's in the prospectus?" And I read him parts about the accounting and about the environmental considerations and he said: "I'm shocked."

And then I called him back and subsequently sent him a copy of the Complaint or the Amended Complaint. I'm not sure.

Q. Is there anything else that he said to you? A. They were relatively brief conversations. I can't recall in great detail. He was away from St. Louis when I tried to call him on several occasions, and I finally caught him at home on the telephone one night.

Q. Basically it is a fair statement that basically he stated he was shocked at the contents of the prospectus? A. Yes, I remember he said: "You're kidding. It says that?" Referring to the prospectus, yes.

Q. Did you talk to anyone else prior to filing the lawsuit in connection with your investigation? A. Well, I, of course, talked to other lawyers in my office. I read several cases, I recall that, where lawsuits were filed in connection with a faulty, alleged faulty prospectus where the underwriting syndicate, I believe, or others who in some cases are joined as defendants, were not joined.

Q. You recall any of those cases? A. I think one of them, if I'm not mistaken, was called **[115]** In Re: KMF Actions, a Massachusetts District Court case. I remember that one by name. It was a derivative action, but the principal is the same.

Q. Did you discuss with Mr. Rosenthal the possibility of joining the lead underwriter, or joining the undewriters as defendants? A. I don't think I asked him his opinion as to what I should do in this lawsuit, no.

Q. Did you discuss the possibility with him? A. Probably.

Q. Did he give you his opinion? A. No.

Q. Did he give you his reaction? A. No, I really only asked him for facts.

Q. Had he left Simon at the time you talked with him? A. Yes.

Q. Did you talk with anyone else who had been with Simon at the time of the offering or who was with Simon at the time you talked with them? A. Are you talking about prior to filing suit?

Q. Prior to filing suit. A. I don't think so. I notified them afterwards that I had filed this suit, but I don't think I actually interviewed or talked with anybody before.

Q. Is there anyone else you talked to on your pre-suit **[116]** investigation of the facts? A. I'm trying to think. I seem to recall making three or four phone calls to people to get some background information, which wasn't necessarily related to the issue which is on the table now, but I can't recall who it was. I just have to see my file at the office. There were several other people I believe.

Q. After filing the lawsuit, did you continue to evaluate and investigate the possibility of joining the underwriters? A. I evaluated, as I now have continued to evaluate, the entire situation. I haven't seriously considered joining any of the underwriters, as you know, that I haven't so far taken any depositions, which might be a factor in establishing some liability on the part of A. G. Edwards and Company, but I don't know.

Q. You testified on your direct testimony, and you named by name a number of other clients in connection with this lawsuit. Do you have any written agreement with any of those companies or individuals with respect to sharing in the payment of any of the expenses of this lawsuit? A. No, just verbal conversations.

Q. And have any of those clients made any specific agreement as to the amount of the expenses, the dollar amount of expenses they would pay, or as to the percentage of expenses **[117]** they would pay? A. They have not.

Q. Prior to the filing of the suit, did you discuss with Chief Livesay the possibility of joining a lead underwriter over the underwriters in the suit? A. Yes.

Q. And just to shortcut things, is it basically accurate that you're the one who ultimately made the decision not to join the underwriters? A. That would be correct.

Q. And did you explain to the Livesays that—strike that.

Did you have any agreement with the Livesays with respect to payment of expenses of the suit if the suit were not successful? Did you, before filing the suit? A. Yes, I did.

Q. And what was that agreement? A. Well, as I said, they agreed to foot the bill on this.

Q. Regardless of what the expenses might be? A. I gave them a rough idea from my own experience as to what I believed the Court costs and other expenses of this litigation would be, and they did agree to pay it.

Q. What was the total amount, both Court costs and expenses? A. I said that it would exceed five thousand dollars, **[118]** probably something close to it, but I wasn't really sure and that, you know, I just wouldn't know until the costs were incurred.

Q. For everything, Court costs and expenses? A. Well, the Court costs were only $15.00.

Q. Well, there's going to be a number of depositions which you will be taking, and I don't want to stand here and quibble, Marty. A. No, I understand.

Q. Let me ask you this before I get into it. What's your current estimate of what the Court costs and expenses would be of pursuing this lawsuit to completion? A. In excess of five thousand dollars, but it's a moot issue at this point because the others have agreed to chip in and cover this.

Q. Well, I don't think it's a moot issue because if the figure is more like twenty-five thousand dollars, which I believe from my experience to be much more realistic, I think we might have an entirely different attitude on the part of the plaintiffs than an estimate of five thousand dollars, and I wanted to get your professional, expert opinion as to what the costs and expenses in this case might run. A. As I said, it will exceed five thousand dollars. If, by some most unusual circumstances, it should run twenty- **[119]** five thousand dollars, those costs will be paid.

Q. By whom? A. My clients.

Q. The Livesays?

The Court: Gentlemen, they're on the record here that they're going all the way, and that they're both going to share in expenses if necessary. Court takes judicial notice of that.

Mr. Richter: I'll drop that, Your Honor.

The Court: It's in the record.

Q. Yes, sir. Have you, to this point, retained any expert witnesses in this case? A. I have not.

* * * * * * *

Cross-Examination

By Mr. Riddle:

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[123] Q. So, if you've got a thousand people who discovered the alleged fraud during that time interim, you would have a thousand separate fact questions? A. They would simply be excused from the class, yes, that's correct. They would not be part of the class if they were barred by the Statute of Limitations and the defendants could prove it.

Q. Well, you're purporting to represent a class though that purchased on May 2nd, 1972, aren't you? A. And the 3rd.

Q. And the 3rd, of '72? A. Yes.

Q. Yes, sir. Now then, with respect to Section 10 (b) of your claim and to draw focus on this, you speak about your client Mr. Morrissey? A. Yes.

Q. Who bought how many shares of—or how many debentures? A. Both. He bought $250,000 worth of the debentures and two thousand shares of the common stock.

Q. Is Mr. Morrissey in the class that your client purports to lead, would like to lead? **[124]** A. That's up to the Court. I would say as far as I'm concerned he is.

Q. Yes, if the Court were to sustain your motion, is Mr. Morrissey then a part of the class that you and your client would lead? A. Yes.

Q. Now then, is it your opinion that Mr. Morrissey would need to establish as a fact that he relied on the prospectus in his 10 (b) (5) Count, and would he have to establish to the satisfaction of the fact-finder that he relied in fact on the prospectus? A. Depends on how you define "rely." If you define "rely" to mean that reliance is presumed once you show the Court or jury that there were material misstatements or omissions in the prospectus, and then reliance is presumed to be conclusive, yes, reliance is then required in that sense only.

Q. Then let's assume in that sense—if I understand His Honor's statement at the outset of this hearing, that reliance is necessary to be proved in a 10 (b) (5) case——

The Court: What I indicated was that I had previously ruled that it was not, and I have changed my mind, and I think I told all counsel prior to this hearing that I was so going to do. Go ahead.

Q. Then in Mr. Morrissey's case, as I understand it, **[125]** it would be necessary for him to show that he relied on one of the misrepresentations in the prospectus, one of the alleged misrepresentations, in order to show the causation between the alleged fraud and his damages. A. See, I don't know how the Court is going to instruct the jury at that time.

Q. Well now, are you saying that reliance can somehow be established without testimony from him and without a special fact-finding that he did, or did not rely on the contents or the misrepresentations in the prospectus? A. Let me explain that.

Q. Please answer the question. A. I can't answer the question unless you allow me to explain my answer.

Q. Well, answer the question and then explain it please.

(Record read)

Q. Is that question clear? A. Yes.

Q. All right, and what's your answer to it? A. The answer is yes, under some circumstances and no under others, depending on what the evidence shows at the trial.

Now, the explanation is this: If the evidence which is developed in this trial shows that what we have is purely **[126]** an omissions case; in other words, that Punta Gorda and the other defendants concealed certain facts that should have been disclosed in the prospectus, then under those circumstances reliance is under no circumstances an issue in this case. In my opinion, because I think you're asking my opinion——

Q. If, on the other hand—— A. No, if, on the other hand, the evidence in this case reveals that it's a case by merely of affirmative misrepresentations, which I don't expect it to be, but if that evidence should come out——

Q. You have made those allegations in your Complaint. A. There are some allegations of affirmative misrepresentations tied to the omissions.

Q. Excuse me, go ahead. A. Then under those circumstances, I think the Court has indicated that reliance must be proved. My opinion, which I think you wanted——

Q. Now, in that last instance, do you agree that reliance must be proved then by each of the persons within the class that you purport to lead in order for there to be a recovery to that member of the class? A. Not with respect to the liability issue. Yes, with respect to damages.

Q. Damages, yes, sir. A. I say, the Court has so indicated. I don't happen **[127]** to agree with the Court's position on that, and I'm hopeful that I can——

The Court: Let me put a question in here, and I'm referring strictly now to manageability——

Mr. Riddle: My questions are going to that, sir.

The Court: Well, I understand that, but assuming, without deciding, that this is declared to be a class action, that's number one, and let's assume that members of the class—how many are there all told?

The Witness: About 1800.

The Court: 1800.

Mr. Riddle: 1858, Your Honor.

The Court: Let's assume that we agree on a notice and everything, and I take it, first, this is a 23 (b) what?

The Witness: (3), I believe.

Mr. Riddle: It's an effort to bring it under that Rule, Your Honor.

The Court: 23 (b) (3)?

Mr. Riddle: Yes.

The Court: All right. Now then, we've got people scattered all over the country.

Mr. Riddle: Yes, Your Honor.

* * * * * * *

[132] **Examination**

By the Court:

Mr. Green, this question about adequacy of representation has been raised. I want you to understand that the questions I'm going to ask you have absolutely no personal connotation, but these gentlemen have been asking you questions about this, that and the other, and about your [illegible] and what studying you did, and all this, that and the other [illegible] and then the next thing we hear about is the Statute of Limitations.

Now, let's just assume that Punta Gorda is flat broke. Let's assume that all the named directors are bankrupt. Let's assume that Lybrand for payment of attorney's fees and other reasons

has become financially embarrassed, and that's all—in other words, let's just assume that there's no financial responsibility in the named defendants. And let's further assume that the underwriters, Edwards, Simon or whatnot, are responsible financially. I'm not talking about liability, I'm just talking about whether there's anything there to get.

Now, my question runs to this: You have not brought an action against either of the underwriters and you have explained rather thoroughly into the record your reasons. But has the Statute of Limitations—now, the evidence here today shows that Mr. Livesay came to you in May of '73 and I would assume that by the end of the month of May the fraud, **[133]** if any, was discoverable. It certainly was discoverable by the 27th day of July, which is the date of the filing of this litigation.

Now, tell me, does the Statute run against Edwards and the other underwriters? A. In my opinion it has, as to the Sections 11 and 12 (2) claims, but not as to the 10 (b) (5).

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[134] The Court: And I want to say this much, gentlemen: I have not anywheres close to—this is a very ticklish question and a very close one in some areas, but this thought also occurs to me. I'm sure you've all heard of the quote Death Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion as to whether—I'm not saying I'm going to decide it that way, but we've got a lot of problems. I don't want to waste —or not waste, but I don't want to spend two or three years with this lawsuit upstairs, and back down, and upstairs and back down, and Mr. and Mrs. Livesay and also the defendants are entitled to as speedy as possible determination of their differences. That's something else you need to think about.

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POST HEARING MEMORANDUM

(Filed March 12, 1975)

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The Motion Should Be Denied Because It Was Not Seasonably Made Nor Diligently Pursued

This action began on July 27, 1973. The plaintiffs' motion for a determination that it could be conducted as a class action was not filed until April 11, 1974—more than eight months after the filing of the Complaint. Oral argument of that motion was on June 24, 1974, and although the plaintiffs had been apprised of the need for evidence to support their motion (see the memorandum filed May 15, 1974, by the Punta Gorda defendants opposing the class action determination), the plaintiffs did not offer any evidence at that time. The plaintiffs' first request for an opportunity to offer evidence on the class action issues was contained in Mr. Green's letter to the Court dated November 18, 1974, shortly after the Court of Appeals denied their mandamus petition. That request did not come until more than seven months after the motion was filed and until almost sixteen months after the Complaint was filed.

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed June 19, 1975)

This matter is before the Court upon the plaintiffs' motion to certify this matter as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The question of whether or not the plaintiffs and their counsel are the proper representatives for the proposed class due to an alleged conflict of interest, has also been raised by the defendants.

It is the defendants' contention that the plaintiffs are barred from maintaining this lawsuit as a class action on the grounds that there would be individual questions of fact concerning compliance with the one year statute of limitations contained in § 13 of the Securities Act of 1933, 15 U.S.C. § 77(m). It is clear that the statute of limitations as contained in the 1933 Act would control the potential recovery by members of the class. However, in the present lawsuit the common questions predominate over the individual ones. The effect of the operation of the statute of limitations as contained in the Securities Act of 1933, may be determined as to the members of the class after a general decision has been rendered upon the defendants' liability. *Bisgeier v. Fotomat Corporation*, 62 F.R.D. 113, 117 (N.D. Ill., 1972); and *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265 (E.D. Penn., 1975).

The same issue of individual questions of law and fact predominating over the common interests of the class has been raised by the defendants concerning the requirement of "reliance" for the alleged violations of the Securities Act of 1934. The Court agrees with the defendants that within the Eighth Circuit, a plaintiff must prove reliance on an individual basis to recover under the provisions of § 10(b) of the Securities Act of 1934, and Rule 10(b)5 promulgated pursuant to that Act. *City National Bank of Fort Smith v. Vanderboom*, 422 F.2d 221 (8th Cir., 1970); and *S.E.C. v. First American Bank and Trust Co.*, 481 F.2d 673 (8th Cir., 1973).

Again, as with the 1933 Act violations, the questions of "reliance" under the 1934 Act may be dealt with on an individual basis after a determination has been made as to liability concerning the entire class. *Umbriac v. American Snacks, Inc.*, supra.

While there are indeed certain individual questions of fact and law regarding this statute of limitations under the Securities Act of 1933 and the issue of "reliance" pursuant to the Securities Act of 1934, the Court is of the opinion that the common questions clearly predominate in this lawsuit and that this action may be maintained as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

A most serious attack on the pursuance of this lawsuit as a class action is made by the defendants with regards to the plaintiffs' propriety as representatives of the class, and the propriety of their representation by their counsel, Mr. Martin Green, due to an alleged conflict of interest.

At this Court's hearing concerning whether or not this lawsuit should be certified as a class action, there was considerable testimony produced regarding the question of the plaintiffs' adequacy of representation, and the alleged conflict of interest of their counsel.

This Court is of the opinion after considering the briefs filed by all parties, and a review of the transcript of the hearing, that

the plaintiffs, Cecil and Dorothy Livesay, will be adequate representatives of the class to be involved in this lawsuit. *Eisen v. Carisle and Jacquelin*, — U.S. —, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

At the hearing held by this Court for the purpose of certifying this lawsuit as a class action, counsel for the plaintiffs, Martin M. Green, stated, while under oath, that he had from time to time represented I. M. Simon and Company on matters unrelated to the public offering of securities of Punta Gorda Isles, Inc. which are presently at issue. I. M. Simon and Company was one of the underwriters in the public offering of securities of Punta Gorda Isles, Inc., which is at issue in this lawsuit. After the filing of this lawsuit, Mr. Green continued to represent I. M. Simon and Company on various matters unrelated to this action. Mr. Green stated that he had made a decision not to join I. M. Simon and Company or any other underwriter as a defendant in this lawsuit. Mr. Green has disclosed his past and present representation of I. M. Simon and Company to the plaintiffs. This Court is of the opinion that even though Mr. Green made a disclosure of his employment to the plaintiffs, a serious conflict of interest, which would go to the very heart of this action, has been raised. It appears to the Court that there have been violations of Disciplinary Rule 5-105(A) and Ethical Considerations 5-14 and 5-15 of Canon 5 of the Code of Professional Responsibility.

Such a conflict of interest clearly goes to the adequacy of the representation of the proposed class. Since the members of the class who do not decide to opt out of the litigation are bound by the named representatives, they are entitled to the best possible advocacy available. To this Court, even the remote possibility of a conflict of interest on the part of the counsel of the class representatives would cast a shadow upon the legitimacy of the entire lawsuit, and any judgment resulting therefrom.

If counsel for the plaintiffs cannot furnish adequate representation to the plaintiff class (and this Court is of the opinion that Mr. Green's relationship with I. M. Simon and Company constitutes a bar to such effective representation), he is therefore estopped from acting as counsel in this case. *Hawk Industries, Inc. v. Bausch & Lomb, Inc.*, 59 F.R.D. 619 (S.D. N.Y., 1973). The key role played by the counsel for the class representative in a class action places a duty upon this Court to zealously guard the rights of the plaintiffs to have representation free from any hint of impropriety. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3rd Cir., 1973).

In order to insure that the plaintiffs, Cecil and Dorothy Livesay, have such adequate representation, this Court will today issue a show cause order to plaintiffs' counsel, Martin M. Green and the law firm of Anderson, Green, Fortus & Lander, to show cause why they should not be enjoined from acting as counsel for the proposed class in this lawsuit.

So that the plaintiffs, Cecil and Dorothy Livesay, will not be inconvenienced or prejudiced during the determination of the show cause order as discussed in the paragraph above, this action will be stayed in all respects until a final determination of the show cause order may be had.

When a final determination has been obtained in the matter of the show cause order, this Court will issue such further orders as it deems necessary to insure that there will be an adjudication of this matter with minimum inconvenience to all parties. In consequence,

It Is Hereby Ordered that plaintiffs' motion to certify this lawsuit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure be and is Granted; and

It Is Further Ordered that this lawsuit be certified as a class action pursuant to Rule 23(B)(3) of the Federal Rules of Civil Procedure; and

It Is Further Ordered that this lawsuit be and is stayed pending a final determination of the matters to be dealt with in this Court's show cause order to Martin M. Green, and the law firm of Anderson, Green, Fortus & Lander, said order to show cause attached to and made a part of this order.

Dated this 19th day of June, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

To: Anderson, Green, Fortus & Lander
Attorneys at Law
120 S. Central Avenue
St. Louis (Clayton), Missouri 63105

SHOW CAUSE ORDER

(Filed June 19, 1975)

Gentlemen:

You are hereby ordered to show cause why you should not be enjoined from acting as counsel for the class stated in Cecil

Livesay, et ux, for themselves and on behalf of all others similarly situated, v. Punta Gorda Isles, Inc., et al., Case No. 73 C 517 (3) now pending in the United States District Court for the Eastern District of Missouri, Eastern Division. Grounds for this Order are stated in this Court's Order filed June 19, 1975, which is attached to this Show Cause Order.

A hearing concerning this matter will be held at 10 A.M. on July 11th, 1975.

Dated this 19th day of June, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION OF MARTIN M. GREEN AND ANDERSON, GREEN, FORTUS & LANDER TO WITHDRAW AS ATTORNEYS FOR PLAINTIFFS

(Filed June 27, 1975)

Movants state:

1. That on July 27, 1973, on behalf of the named plaintiffs herein, they instituted a class action against the defendants and continued to represent them until on or about June 19, 1975, when the Court, in a Memorandum and Order filed on said date, found that a conflict of interest existed because movants also represented I. M. Simon & Co., a member of

the underwriting group which distributed certain securities of defendant, Punta Gorda Isles, Inc., at the May 2, 1972, underwriting;

2. That in view of the finding by the Court of the said conflict of interest, movants feel that they should no longer continue to represent the plaintiffs, or the class represented by the plaintiffs, as such continued representation would be detrimental to the welfare of the class;

Wherefore, Martin M. Green and Anderson, Green, Fortus & Lander move that the Court enter its Order permitting them to withdraw as counsel to Cecil and Dorothy Livesay and the class represented by them in the above-entitled action.

ANDERSON, GREEN, FORTUS
& LANDER
By MARTIN M. GREEN
Attorneys for Plaintiffs
120 South Central, Suite 938
Clayton, Missouri 63105
862-6800

June 27, 1975

MEMORANDUM FOR CLERK

Motion of Martin M. Green and Anderson, Green, Fortus & Lander to withdraw as attorneys for Cecil Livesay and Dorothy Livesay and the class represented by them is sustained, and said attorneys are hereby granted leave to withdraw as attorneys for Cecil and Dorothy Livesay and the class represented by them.

So Ordered:

/s/ H. KENNETH WANGELIN
Judge, United States District Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISSOLVE STAY ORDER

(Filed July 25, 1975)

Come now plaintiffs, by and through their attorneys, and hereby move this Court for its order dissolving its orders staying proceedings in the above entitled cause, and as grounds therefor, state the following:

1. By order of this Court dated May 13, 1974 all discovery was stayed except that relating to the class action determination. The reason for the granting of the stay at that point was to await the outcome of the ruling by this Court as to whether the plaintiffs' motion to certify this matter as a class action would be granted. By order of this Court dated June 19, 1975 said motion to so certify this lawsuit was granted, and accordingly there is no longer any reason to continue the said stay of May 13, 1974.

2. By said order dated June 19, 1975 this lawsuit was stayed pending a final determination of the matters to be dealt with in this Court's order to Martin M. Green and the law firm of Anderson, Green, Fortus & Lander to show cause why they should not be enjoined from acting as counsel for the proposed class in this lawsuit. Subsequently said lawyers have withdrawn as attorneys for the plaintiffs and new counsel have entered their appearance. Accordingly there is no longer any reason to continue the stay that was entered on June 19, 1975.

3. Plaintiffs desire to proceed with the prosecution of this action and in connection therewith desire to commence expeditiously all necessary and appropriate pre-trial discovery.

Wherefore, plaintiffs move for the order of this Court dissolving the aforesaid stay orders.

MILBERG & WEISS
1 Pennsylvania Plaza
New York, New York 10001
212/594-5300

SLONIM and ROSS
111 South Meramec, Suite 506
Clayton, Missouri 63105
725-1060
Attorneys for Plaintiffs

(Certificate of service omitted in printing.)

PEPER, MARTIN, JENSEN, MAICHEL AND HETLAGE
Attorneys at Law
720 Olive Street, Twenty-Fourth Floor
St. Louis, Missouri 63101

August 4, 1975

Mr. Bernard A. Feuerstein
Milberg & Weiss
Counselors at Law
One Pennsylvania Plaza
New York, New York 10001

Dear Bernie:

Re your letter of July 30, my notes of the meeting indicate that you planned as one early step in your discovery to explore obtaining from the transfer agents the initial registration of the stock and debentures purchased pursuant to the registration statement of May 2, 1972. I did not understand that you were

requesting us to furnish you a list of the initial registrations. However, we understand from your letter of July 30 that you are requesting us to furnish a list of the initial registered stockholders and debenture holders.

We do not have any information on the initial registration of the debentures. Accordingly, you would have to obtain such a list from Bankers Trust Company in New York which is the transfer agent for the debentures.

We have obtained a list of the initial registration of the common stock from Mercantile Trust Company of St. Louis, the transfer agent for the common stock. The transfer agent charged $360 for compiling such information, and we will furnish you a copy of the list upon receiving reimbursement of the $360. I should point out the list which we have does not include the addresses of the initial registered holders. Mercantile Trust estimates it would charge approximately $100 to provide the addresses.

Please let me know what your wishes are in this matter.

Sincerely,

WILLIAM A. RICHTER

WAR:at

cc: Veryl L. Riddle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

MOTION
For Reconsideration, or in the Alternative, for Modification in View of the Appearance of New Counsel

(Filed August 20, 1975)

Comes now defendant, Coopers & Lybrand, and pursuant to F.R.C.P. 23(c)(1) respectfully moves the Court to reconsider, or in the alternative, for modification of its Order dated June 19, 1975 relating to the certification of this case as a class action for the following reasons:

1. This Court's Order of June 19, 1975, among other things, ordered plaintiffs' counsel to show cause why he should not be removed, etc. This action by the Court is obviously occasioned by its commendable concern that the class which plaintiffs seek to lead be adequately represented and that the rights of each member thereof be fairly and professionally represented by counsel in accordance with the canons of ethics, the rules of this Court and the Federal Rules of Civil Procedure.

2. On or about June 27, 1975 Mr. Green sought leave to withdraw as counsel for plaintiffs in lieu of showing why he should not be removed. The Court has granted Mr. Green's request to withdraw.

3. On or about June 30, 1975 Milberg & Weiss of New York City entered their appearance as counsel for plaintiffs and retained Slonim and Ross to serve as local counsel only.

4. A conference concerning this litigation was held in St. Louis, Missouri on or about July 24, 1975 and was attended by Mr. Melvin Weiss and Mr. Bernard Feuerstein of Milberg & Weiss, Mr. Richard Ross of Slonim and Ross, Mr. William A. Richter of Peper, Martin, Jensen, Maichel & Hetlage, and Veryl L. Riddle and John J. Hennelly, Jr. of Bryan, Cave, McPheeters & McRoberts. At that meeting, Mr. Weiss, a partner in the Milberg & Weiss firm, was requested to advise counsel for defendant (i) whether there were any other persons to be added as party defendants, and (ii) for his estimate of the costs and expenses that would likely be incurred in the preparation and trial of this complex case. Mr. Weiss refused to answer either question, and on July 25, 1975 new counsel filed their motion seeking to have the Court's Stay Order on Discovery lifted.

5. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that a class action may be maintained only if the representative parties will fairly and adequately protect the interests of the class. There is no evidence before this Court establishing new counsel's suitability to represent the class or plaintiffs' commitment to new counsel to pay the costs and expenses of the litigation.

Wherefore, defendant requests the Court to consider whether plaintiffs and their present counsel are adequate representatives of the proposed class and specifically to inquire as to the suitability of plaintiffs' new attorneys, Milberg & Weiss, to represent the class and whether plaintiffs have been fully advised of the costs and expenses which could be assessed against them and whether they are committed to paying the same. Defendant further requests the Court to continue in effect its Order Staying Discovery until it has completed its consideration of these matters

(which can probably be disposed of in a brief hearing before the Court) and until plaintiffs have decided whether or not to add any additional parties.

Respectfully submitted,

VERYL L. RIDDLE
JOHN J. HENNELLY, JR.
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
Attorneys for Defendant Coopers and Lybrand

BRYAN, CAVE, McPHEETERS
& McROBERTS
Of Counsel

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT

(Filed September 5, 1975)

State of New York }
County of New York } ss.

Melvyn I. Weiss, being duly sworn, deposes and says:

1. I am a member of Milberg & Weiss, co-counsel for plaintiffs in the above-entitled action, and makes this affidavit in

opposition to the motion by defendant, Coopers & Lybrand, which has been joined in by the other defendants, for reconsideration of the adequacy of plaintiffs and their counsel to prosecute this class action and for reconsideration of certain aspects of this court's previously rendered decision certifying this action as a class action pursuant to Rule 23 of the FRCP.

Adequacy of Representation

2. The first issue raised by the movants for consideration is whether or not plaintiffs continue to manifest their resolve to stand behind the costs of the prosecution of this action in view of their retention of new counsel to represent them. The affidavit of Cecil and Dorothy Livesay, submitted herewith, emphatically demonstrates that there has been no change in their attitude and desire to continue as class representatives in this action and to stand behind the costs associated therewith.

3. The second issue raised by the movants concerns itself with the qualifications of new counsel for plaintiffs to prosecute the claims alleged in the complaint. Attached hereto as Exhibits "A" and "B" are short resumes of the backgrounds of Milberg & Weiss and Slonim & Ross in the field of securities and class action litigation. Milberg & Weiss has been recognized by bench and bar as specialists in such litigation. Some examples of the recognition of their expertise are the following:

A) Judge Whitman Knapp in a recent decision in **Benerofe v. Bartlett,** (S.D. N.Y.) Index No. 70 Civ. 3415, stated:

> "The competence and standing of lead counsel, the firm of Milberg & Weiss, in the area of securities law is too well known to require comment."

B) Judge Morris E. Lasker, in **Feldman v. Hanley,** 49 F.R.D. 48 (S.D. NY), stated:

". . . the long experience and demonstrated skill of Lawrence Milberg, Esq., impels the court to designate him to the position of lead counsel."

C) The Practising Law Institute has recently invited your deponent to serve as a faculty member in its "Accountant's Liability: Law and Litigation" seminar, to be given in Los Angeles and New York City during the month of October. Also serving as faculty members are two representatives of Coopers & Lybrand. A copy of the PLI brochure is annexed hereto as Exhibit "C".

D) As can be seen by the annexed resume of the firm, Milberg & Weiss has participated and is presently engaged in numerous jurisdictions throughout the country and has been in the past involved in many of the leading cases in the development of Section 10(b) liability.

4. The movants raise still a third issue on the question of adequacy of representation in the form of questioning whether certain underwriters of Punta Gorda will be added as defendants in this action. It should be noted that the present defendants have a right to name such underwriters in a third party action in which they can seek contribution and indemnity. Your deponent has analyzed many of the documents in this case and can not help but notice that the firm, Peper, Martin, Jensen, Maichel & Hetlage, represented the underwriters at the time of offering. That same firm now represents Punta Gorda in this litigation. While this court considered the question of conflict of interest as it applied to plaintiffs' counsel in its decision rendered on the class motion, the conflict in which the Peper, Martin firm finds itself was not raised. It can be reasonably asked why the defendants have not sued the undrwriters for contribution if, indeed, they believe the underwriters to be responsible for the alleged wrongs.

5. In any event, your deponent has given consideration to the question of whether or not it would be in the best interest of

the class to name the underwriters as defendants at this stage of the instant litigation. In considering the advisability of such a move, numerous factors were taken into account, some of which it is respectfully urged are within the domain of privileged communications between an attorney and his client or attorney's work product, and should not be subject to scrutiny by the adversary. However, deponent would not be reluctant to discuss these matters in private with this Honorable Court.

6. The conclusion has been reached not to name additional defendants at the present time. Plaintiffs have concluded that the primary responsibility for the wrongs alleged in the complaint rests with those defendants who are presently named. In addition, it appears that the instant defendants have sufficient means to satisfy any judgment obtained against them. The fact that the underwriters are not named as defendants will not preclude plaintiffs from seeking discovery as against the underwriters, and it is principally the information in the underwriters' possession that will assist plaintiffs in obtaining a remedy on behalf of the class against the primary wrongdoers. Clearly, the underwriters relied upon defendant Coopers & Lybrand with respect to the accounting presentations contained in the prospectus. In addition, the underwriters relied upon the company and its officers and directors to insure that the representations contained in the prospectus, both with respect to the financial presentations and environmental matters, were correct. The fact that the existing defendants have not crossclaimed against the underwriters supports such a theory. If the Peper, Martin firm, while representing Punta Gorda, concluded that the underwriters acted wrongfully, it is reasonable to assume that they would have advised their client to bring in the underwriters as third-party defendants. Under these circumstances, and further taking into account that this action has been pending since 1973, it has been concluded that it will not be in the best interests of the class to presently name additional defendants.

Request to Amend the Class Decision

7. Plaintiffs believe that this court's decision on the class motion was proper and in full accord with the existing law. A Memorandum of Law is respectfully submitted herewith in opposition to defendants' attempts to alter the prior decision of this court.

Class Definition

8. Plaintiffs take issue with the definition of the class urged by the defendants at Pages 4 and 5 of their "Suggestions in Support of Defendants' Motions". Section 11 of the Securities Act of 1933 permits any person who purchased shares pursuant to the Registration Statement to sue whether he purchased on the date of the offering or during the after market. Section 11 specifically provides that until a full twelve-month statement for a period subsequent to the date of the offering is issued by the company, a purchaser of such securities can institute an action without proving reliance and need only demonstrate that there was a material misstatement or omission in the prospectus. Plaintiffs therefore urge that the class include all persons similarly situated to the plaintiffs, to wit—any purchaser of Punta Gorda common stock or debentures who purchased during the period May 2, 1972 to the date of the issuance of the first report of earning for a full twelve-month period following the effective date of the Registration Statement, and which shares can be traced to the Registration Statement.

/s/ MELVYN I. WEISS

Sworn to before me this 4 day of September, 1975.

Flora E. Cave
Notary Public, State of New York
No. 24-0605450
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1977

[Exhibits Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in Printing)

AFFIDAVIT

(Filed September 5, 1975)

State of Missouri
County of . . . . . .

Cecil Livesay and Dorothy Livesay, being duly sworn, depose and say:

1. We are the plaintiffs in this action and make this affidavit in opposition to defendant, Coopers & Lybrand's motion for reconsideration or modification of this Court's Order dated June 19, 1975 regarding certification of this case as a class action.

2. It has been brought to our attention that, in light of the fact that we have retained new counsel for the prosecution of

this action, defendant has raised again the question whether we are willing to commit ourselves to pay the costs of this litigation.

3. We have been informed by Mr. Melvyn Weiss of Milberg & Weiss, our new attorneys in this matter, that he estimates the total cost of this litigation at about $15,000.00 with a possibility that the actual costs could exceed that amount.

4. We remain firm in our commiment to stand responsible for the costs and expenses of this action regardless of the ultimate amount involved, and we remain firm in our intention to proceed with this case as a class action.

/s/ CECIL LIVESAY
/s/ DOROTHY LIVESAY

Sworn to before me this 3rd day of September, 1975.

/s/ MARGARET C. BURHAM
Notary Public

My Commission expires Feb. 26, 1977.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

(Filed October 23, 1975)

This matter is before the Court upon plaintiffs' motion to dissolve this Court's Orders staying discovery and staying the

proceeding and defendants' motions to reconsider certification of this as a class action and to modify this Court's Order certifying this as a class action.

The Court is presently concerned with plaintiffs' adequacy as representative of the class. The question of adequacy was previously raised regarding the absence of two underwriters involved in the sale of Punta Gorda Isles, Inc.'s securities as parties defendant; the result of that determination was a change of counsel for plaintiffs. The two underwriters in question at that time have still not been joined, and there is a distinct possibility that claims against them are now time barred. Not including these underwriters in the present action may affect the interests of the class generally as there is a smaller potential fund for damages if liability is found against the defendants. The interests of the subclass of those persons who made their purchases of stock and debentures from the two absent underwriters may be affected particularly.

The presence of new counsel does not in itself erase the shadow of inadequate representation previously cast. The absent underwriters should be joined immediately by plaintiffs as parties defendant to protect potential claims against them from a complete time bar. Deference, however, will be given to plaintiff if adequate reasons are given by counsel in an in-camera conference for not joining these two underwriters.

Even if the two absent underwriters are joined, the question of plaintiffs' adequacy as representatives of the class remains. Plaintiffs have shown a lack of complete willingness to protect the interests of *all* the members of the class throughout the course of this action. "[The] authorities indicate clearly that the primary criterion [for class representatives] is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process." *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y., 1968). To decertify

this as a class action at this time based on the inadequacy of representation, however, may jeopardize potentially valid claims held by absent class members. Notice, therefore, should be sent out to the class pursuant to F.R.C.P. 23(c)(2). In this manner, the members of the class will be on notice as to the disposition of the present action and will have the opportunity to choose for themselves if they wish to be bound by the judgment that will ensue. The notice will specify first that members may exclude themselves from the class upon request, F.R.C.P. 23(c)(2)(A); that if the class member does not opt out then he will be bound by the judgment entered, F.R.C.P. 23(c)(2)(B); that if the class member does not exclude himself he may enter an appearance through counsel, F.R.C.P. 23(c)(2)(C); and that the Court requests petitions for appointment of new class representative or in the alternative, intervention by class members, F.R.C.P. 23(d)(2). To explain the Court's request for petitions or intervention, sufficient facts of the case will be given in the notice.

Before notice can be sent out, the class must be defined and the names and addresses of the class members found. To this end, the Court now turns its attention to the motions of the parties.

That part of defendant's motion to amend this Court's Order defining the class should be granted. Plaintiff will not be heard at this late date to change the composition of the class to include post-May 3, 1972, open market purchasers of Punta Gorda securities. That change, if allowed, would substantially alter the substance of this lawsuit. The determination hearing and this Court's subsequent Order certifying this as a class action were premised on the definition of the class now requested by defendant to be included in the Order. This Court now only makes explicit what had previously been impliedly accepted. Additionally, plaintiffs are now purporting to have represented these additional alleged members of the class prior

to the present motions. Waiting until the present time, considering the probable time bar affecting the claims of these alleged class members, indicates a lackadaisical disposition toward the interests of the class which does not comport with the duties of a class representative.

The class shall consist of those persons defined in paragraph 4. of the parties' stipulation.

> "The proposed class consists only of those persons who purchased Punta Gorda stocks and debentures at the public offering on May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972, and who thereafter either retained their securities or sold them at a loss, and said proposed class does not include anyone who purchased Punta Gorda securities in the open market subsequent to May 3, 1972, the date the syndicate closed."

The plaintiffs' motion to dissolve this Court's stay orders will be granted in part. Discovery shall proceed as to finding the names and addresses of the class members.

Determination of that part of defendants' motion to modify this Court's Orders relating to issues suitable for class action will be held in abeyance until the period of time given to the class members in the notice to opt out or enter an appearance has expired. This will allow any class member who may appear an opportunity to be involved in this determination. In consequence,

It Is Hereby Ordered that plaintiffs' motion to dissolve this Court's Orders staying discovery and staying the proceeding will be granted insofar as allowing discovery to proceed as to the names and addresses of members of the class; and

It Is Further Ordered that that part of defendants' motion to modify this Court's Order by defining the members of the

class to include those defined in the stipulation of the parties be and is hereby Granted; and

It Is Further Ordered that that part of defendants' motion to modify this Court's Order by defining those issues suitable for class action treatment is held in abeyance until such time as the period given in the notice to be sent out to members of the class to petition the Court or to intervene has expired; and

It Is Further Ordered that the parties shall submit proposed drafts of the notice to be sent out to the class members within thirty (30) days from the date of this Order; and

It Is Further Ordered that plaintiff is directed to join the additional parties defendant for the reasons stated above, subject only to a determination made by this Court in an in-camera conference if requested by plaintiffs' counsel.

Dated this 23rd day of October, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge

MILBERG & WEISS
Counselors at Law
One Pennsylvania Plaza
New York, N.Y. 10001
(212) 594-5300

November 26, 1975

The Honorable H. Kenneth Wangelin
United States District Judge
United States District Courthouse
Eastern District of Missouri
1114 Market Street
St. Louis, Missouri 63101

Re: Livesay vs. Punta Gorda Isles, Inc.
et al., No. 73 C 517(3)

Dear Judge Wangelin:

We are in receipt of a letter dated November 21, 1975 from Bryan, Cave to your Honor enclosing a proposed Form of Notice in the above-entitled action.

It is respectfully submitted that the Bryan, Cave proposal is contrary to Rule 23, the overwhelming case law which deals with the propriety of class notices, and is not designed for the ultimate protection of the class. We submit herewith a copy of a recent 9th Circuit decision in **Blackie v. Barrack,** reported in CCH Federal Securities Report, ¶ 95,312.

It indeed seems peculiar that a defendant, whose sole interest is to avoid any recovery against it, should posture to the Court how best to protect the interests of its adversaries.

We further take this opportunity to again urge your Honor to forthwith lift the stay on substantive discovery in the instant action. Your Honor will recall that at the end of 1974 the Cir-

cuit Court suggested that your Honor would promptly decide the class question and soon thereafter remove the stay on discovery. Approximately one year has now elapsed since the Circuit Court so spoke and the clamp on substantive discovery still remains.

In view of the fact that at the last conference with your Honor, in chambers, your Honor stated that Chief Livesay and his wife are adequate representatives of the class, and further that there is no question concerning the adequacy of their new counsel, it is clear that the best interests of the class would be served if the action proceeded on the merits. This action has been pending since 1973 and we are sure that your Honor is interested in seeing the light at the end of the tunnel.

We eagerly await your Honor's prompt action on this request.

Most respectfully submitted,

MILBERG & WEISS
/s/ By MELVYN I. WEISS

MIW:mbb

CC: Veryl L. Riddle, Esq.

CC: Wm. A. Richter

UNITED STATES DISTRICT COURT
Eastern and Western Districts of Missouri
315 U. S. Court House & Custom House
St. Louis, Missouri 63101

March 1, 1976

TO: Counsel of Record

RE: Cecil Livesay, et ux,
vs.
Punta Gorda Isles, Inc., et al.,
Case No. 73 C 517 (3)

Gentlemen:

Enclosed you will find a copy of the proposed "Notice of Pendency of Class Action" which I would propose to have the plaintiff issue to all potential members of the Class.

If you have any objections, comments, or suggestions, they should be in this office no later than March 26, 1976.

Yours very truly,
/s/ H. KENNETH WANGELIN
United States District Judge

CC: Mr. Jared Specthrie
Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. William A. Richter

UNITED STATES DISTRICT COURT
Eastern and Western Districts of Missouri
315 U. S. Court House & Custom House
St. Louis, Missouri 63101

April 9, 1976

TO: Counsel of Record

RE: Cecil Livesay, et ux,
vs.
Punta Gorda Isles, Inc., et al.,
Case No. 73 C 517 (3)

Gentlemen:

Enclosed you will find a copy of the "Notice of Pendency of Class Action" which counsel for the plaintiff will issue to all potential members of the Class.

Counsel for the plaintiff should make the necessary modifications in the Request for Exclusion From the Class Action, so that all potential class members will have a period of thirty (30) days from the date of the "Notice of Pendency" to "opt-out" from the above styled litigation.

Yours very truly,

/s/ H. KENNETH WANGELIN
United States District Judge

CC: Mr. Jared Specthrie
Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. William A. Richter

———

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

Mail on or Before January , 1976.

Request for Exclusion From Class Action

To: William D. Rund, Clerk
United States District Court
1114 Market Street
St. Louis, Missouri 63101

The undersigned respectfully requests to be excluded from the class action in the above cause, in accordance with the terms of the Notice of Pendency of Class Action dated January , 1976.

I understand that by this request, I will not be entitled to share in the benefits of the judgment if it is favorable to the plaintiffs, and that I will not be bound by the judgment rendered in this case if it is adverse to the plaintiffs.

Dated this ..... day of ....., 197...

.....
Signature
If a Corporation or Partnership

.....
(Name)

.....
(Authorized Signature)

.....
(Position)

———

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

Proposed Notice of Pendency of Class Action

To: All Persons Who Purchased Common Stock or 6% Convertible Subordinated Debentures Due 1992 of Punta Gorda Isles, Inc. on the Public Offering of May 2, 1972.

1. This notice is given pursuant to Rule 23(c) and 23(d) of the Federal Rules of Civil Procedure and pursuant to an Order of the United States District Court for the Eastern District of Missouri, Eastern Division (the "Court") filed October 23, 1975.

2. This notice is given to all persons who purchased the shares of common stock or 6% convertible subordinated debentures due 1992, or both, of Punta Gorda Isles, Inc. at the public offering of May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972.

3. This notice is not to be understood as an expression of any opinion by this Court as to the merits of the claims or defenses asserted by the parties in this litigation, but is sent for the sole purpose of informing you of the pendency of this action and the rights which you have with respect to it.

4. On or about July 27, 1973, Cecil Livesay and Dorothy Livesay, his wife (hereinafter referred to as the "named plaintiffs"), filed a civil suit in this Court against Punta Gorda Isles, Inc., certain of its officers and directors, and its independent auditors, Coopers and Lybrand, arising out of the aforesaid public offering of common stock and debentures of Punta Gorda Isles, Inc. on May 2, 1972. This action is brought

under the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The complaint alleges, in substance, that the Registration Statement and Prospectus upon which the public offering was based misrepresented and omitted certain material facts. In this civil action the named plaintiffs requested, among other things, that the Court determine the action to be a class action and prayed for damages on behalf of themselves and members of the class as defined in paragraph 6 hereof. All of the named defendants were served or appeared and are parties to this litigation.

5. The defendants deny all the material allegations of the complaint and deny that there were any misrepresentations or omissions with respect to the Registration Statement and Prospectus and deny any liability to the named plaintiffs or the members of the class, and have asserted various defenses.

6. The Court, by a Memorandum and Order entered on the 19th day of June 1975, and a Memorandum and Order entered the 23rd day of October 1975, directed the suit to proceed as a class action, and defined the class as being comprised of all those persons who purchased the shares of common stock or 6% convertible subordinated debentures due 1992, or both, of Punta Gorda Isles, Inc. at the public offering of May 2, 1972, pursuant to the Registration Statement and Prospectus dated May 2, 1972, and does not include anyone who purchased Punta Gorda securities in the open market subsequent to May 3, 1972, the date the syndicate closed.

7. The Court has not yet determined with respect to which particular issues this action may be maintained as a class action and has reserved its ruling on that question until after the last date by which class members may exclude themselves from the class.

8. The named plaintiffs were originally represented in this action by a St. Louis County, Missouri, law firm who withdrew as attorneys for the named plaintiffs on June 27, 1975,

after the Court indicated in its Order of June 19, 1975, that said attorneys may have had a conflict of interest which would preclude them from representing the proposed class. (They represented one of the underwriters who participated in the aforesaid public offering on matters not connected with the underwriting.) The named plaintiffs did not join any of the underwriters as defendants in this action because their original attorneys believed that their investigation revealed no grounds for asserting a claim against the underwriters. The Court in its Order of October 23, 1975, conditionally directed the named plaintiffs to join the underwriters as parties defendant; the applicable statutes of limitations, however, may now bar any claim against them.

9. In order to ensure that the interests of the absent class members will be adequately represented, the class members are invited to file with the Court petitions for the appointment of new class representatives or, in the alternative, to intervene in this action pursuant to the rights of a class member defined in paragraph 11.

10. If you satisfy the criteria for class membership set forth in paragraph 6, you will be deemed a member of the class and will be bound by the judgment entered in this action whether favorable or unfavorable to the class. You will be represented by the named plaintiffs in this action and their counsel: Milberg & Weiss, One Pennsylvania Plaza, New York, New York 10001.

11. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure, you may enter your appearance in this action by counsel of your choice. As a member of the class, you have the right to state to the Court at any time whether or not you consider the representation of the class by the named plaintiffs or their counsel to be fair and adequate and you may ask the Court to substitute you and your counsel for them as class representatives. You may also intervene as a party in the action.

12. If you do not wish to be included as a member of the class of plaintiffs in this action, you may be excluded by completing the form of "Exclusion Request" enclosed with this notice, signing it and mailing it to the clerk of this Court at the address given in paragraph 13 below by mail, postmarked on or before . If your "Exclusion Request" is timely received: (a) you will be excluded from the class; (b) you will not be allowed to share in the recovery, if any; and (c) you will not be precluded from prosecuting your own claim as you will be if you do not exclude yourself from the class.

13. Please address all requests to be excluded from the class and any other communications commenting upon the conduct of this action to William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri 63101.

14. This Court has retained jurisdiction of this action to correct, modify, annul, vacate and supplement the described Orders determining this cause to be a class action from time to time before a decision on the merits.

15. The pleadings and other papers filed in this action are public records, available for inspection in the office of the Clerk of the Court, United States District Court, 1114 Market Street, St. Louis, Missouri 63101.

Dated this ..... day of ....., 1976.

H. KENNETH WANGELIN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' SECOND REQUEST FOR THE PRODUCTION OF DOCUMENTS FROM DEFENDANT PUNTA GORDA ISLES, INC.

(Filed July 20, 1976)

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant Punta Gorda Isles, Inc. produce for plaintiffs' inspection and copying at the office of Slonim and Ross, 111 South Meramec Avenue, Clayton, Missouri 63105, on or before August 24, 1976 (1) a list of the names and addresses of all registered owners of the Punta Gorda common stock and 6% convertible subordinated debentures offered to the public on May 2, 1972 whose names appear on the transfer records of Punta Gorda Isles, Inc. on May 2, 1972 or at any time within ninety days thereafter and (2) such other and additional documents in the possession, custody or control of Punta Gorda Isles, Inc., or any of its transfer agents as will enable plaintiffs to send the Notice of Pendency of Class Action to all potential members of the Class.

Dated: St. Louis, Missouri
July 20, 1976

SLONIM AND ROSS
By (Illegible)
A Member of the Firm
111 South Meramec Avenue
Clayton, Missouri 63105

MILBERG & WEISS
One Pennsylvania Plaza
New York, New York 10001
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION OF DEFENDANT COOPERS AND LYBRAND TO DECERTIFY CLASS ACTION

(Filed July 23, 1976)

Comes now defendant Coopers & Lybrand and pursuant to F.R.C.P. 23(c)(1) respectively moves the court to decertify this case as a class action, for the following reasons:

1. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that a class action may be maintained only if the representative parties will fairly and adequately protect the interests of the class members. The history of this litigation during the three years since it was filed clearly demonstrates that plaintiffs have not and will not adequately protect the interests of the absent class members.

2. Rule 23(c)(1) requires that a determination shall be made as soon as practicable after the commencement of an action as to whether it shall be maintained as a class action. Plaintiffs did not seek to have this court consider and declare this case suitable for class action treatment until April 9, 1974, over eight months after filing suit.

3. In connection with their motion for class determination, plaintiffs additionally sought to side-step their burden of showing that this case was suitable for class treatment and that plaintiffs were adequate class representatives. In spite of a clear and unequivocal instruction from the court on June 24, 1974, plaintiffs refused to present such evidence as was necessary for the court to determine whether the case was suitable for class treatment and plaintiffs were adequate class representatives. Due to plaintiffs' delay, the hearing on the class action determination was not held until December 30, 1974, approximately seventeen months after suit was filed.

4. When the hearing on the class determination was finally held, the reason for plaintiffs' reluctance to present evidence concerning their adequacy as class representatives became apparent. Plaintiffs' counsel testified that he represented a member of the underwriting group on the Punta Gorda public offering who for no apparent reason had not been named as a defendant in the action. The evidence showed additionally that the underwriters were potential defendants. Based upon this testimony, the court found and concluded that a conflict of interests existed which "cast a shadow upon the legitimacy of the entire lawsuit, and any judgment resulting therefrom." (Memorandum and Order, dated June 19, 1975, p. 4) As a result of this conflict, the court subsequently expressed serious doubts as to the adequacy of plaintiffs as representatives of the class. (Memorandum and Order, dated October 23, 1975, p. 2)

5. Approximately 13 months have passed since the court certified this case as a class action and plaintiffs' new counsel entered their appearance. During that period, plaintiffs have not discharged their duty as class representatives to vigorously prosecute the action. Plaintiffs without adequate excuse did not until July 20, 1976 institute discovery to determine the names and addresses of the absent class members. Such discovery will in all probability not be completed for many more months, and

notice of the pendency of this action will undoubtedly not reach the absent class members until the latter part of 1976, some three and one-half years after the suit was filed. This lackadaisical approach by plaintiffs to prosecuting this lawsuit demonstrates that they have not and will not adequately protect and advance the interests of the absent class members.

6. Plaintiffs' new counsel have unsuccessfully sought to expand the class to include open market purchasers. This was contrary to the interests of the absent class members in that it would, *inter alia*, have the effect of reducing the potential amount available for recovery to the class under Section 11 of the 1933 Act.

7. In view of the manifest shortcomings of plaintiffs as representatives of the class, there is a substantial likelihood that absent class members would not be bound by any judgment rendered in this case.

8. Rule 23(d)(3) requires that the court find that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among the factors to be considered by the court are the interests of the members of the class in individually controlling the prosecution of their claims. Based upon the inadequate and nonchalant prosecution of this action by plaintiffs, it is clear that each absent class member has a paramount interest in prosecuting and controlling his own individual action.

9. Rule 23(b)(3) also requires the court to consider the difficulties likely to be encountered in the management of this case as a class action. Although the court's order certifying this case as a class action commented that common questions appeared to predominate, it did not conclude that the case would be manageable as a class action. The court has found that recovery under Rule 10-b of the Securities Exchange Act of 1934 and under Sections 11 and 12(2) of the Securities Act of 1933 will require individual proof by each class member of reliance

and compliance with the statute of limitations. In addition, defendant intends to assert and pursue available affirmative defenses which likewise will require individualized factual determinations. The necessity for these individual inquiries renders this case unmanageable as a class action.

10. Neither plaintiffs nor the absent class members will be prejudiced by the decertification of the case as a class action.

Wherefore, defendant Coopers & Lybrand respectfully requests this court to decertify this action as a class action on the grounds that plaintiffs are not adequate representatives of the class and that the case would not be manageable as a class action.

Respectfully submitted,

BRYAN, CAVE, McPHEETERS & McROBERTS
VERYL L. RIDDLE
JOHN J. HENNELLY, JR.
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Defendant Coopers & Lybrand

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OBJECTIONS OF DEFENDANT PUNTA GORDA ISLES, INC. TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

(Filed August 9, 1976)

Comes now defendant Punta Gorda Isles, Inc. and hereby makes the following objections to plaintiffs' second request for production of documents:

1. Defendant objects to the production of any documents described in request number one on the following grounds:

a. Request number one requests production of documents that are not relevant to any issue in this action, for the reason that the names and addresses of the registered owners appearing on the transfer records at any time within ninety days after May 2, 1972 will not produce the names and addresses of the class members nor evidence reasonably calculated to lead to the discovery of the names and addresses of the class members, but will merely include random names of all registered owners appearing of record during said ninety-day period.

b. The plaintiff is not entitled to have discovery from this defendant of the documents described in request number one as such documents are not in defendants' custody and cannot be obtained by plaintiff without incurring of expense, and it is plaintiffs' obligation to obtain discovery of said documents from the appropriate persons at plaintiffs' expense.

2. Defendant objects to the production of any documents described in request number two on the following grounds:

a. Request number two is broad, vague, and indefinite and does not designate any documents with sufficient particularity to enable defendant to identify such documents in order to respond to such request.

b. The plaintiff is not entitled to have discovery from this defendant of the documents described in request number one as such documents are not in defendants' custody and cannot be obtained by plaintiff without incurring of expense, and it is plaintiffs' obligation to obtain discovery of said documents from the appropriate persons at plaintiffs' expense.

PEPER, MARTIN, JENSEN, MAICHEL
and HETLAGE
By: WILLIAM A. RICHTER
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850

(Ceritficate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cecil and Dorothy Livesay,
Plaintiffs,
vs.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 73 C 517 (3)

ORDER

(Filed Sept. 1, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that the motion of the various defendants to decertify this case as a class action be and is Granted; and

It Is Further Ordered that this action be and is decertified as a class action; and

It Is Further Ordered that this matter shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay; and

It Is Further Ordered that this action shall be set for trial at a later date; and

It Is Further Ordered that all restrictions on discovery shall be lifted, and that discovery with regards to the individual claims of Cecil and Dorothy Livesay shall proceed in a normal fashion.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

[The Memorandum of the District Court filed September 1, 1976, is reproduced at pages A-1 to A-3 of the Petition for Writ of Certiorari filed by Petitioner Coopers & Lybrand in No. 76-1836.]

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated,
Plaintiffs,

vs.

Punta Gorda Isles, Inc.,
Wilber H. Cole,
Alfred M. Johns,
Robert J. Barbee,
Samuel A. Burchers, Jr.,
Russell C. Faber,
John Matarese,
Robert C. Wade,
Earl Drayton Farr, Jr.,
John W. Douglas, D.D.S.,
Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),
Defendants

No. 73 C 517(3)

NOTICE OF APPEAL

(Filed Sept. 29, 1976)

Notice Is Hereby Given that Cecil and Dorothy Livesay, plaintiffs above-named, for themselves and on behalf of a class of persons similarly situated, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Order dated and entered September 1, 1976 in this action insofar as that Order granted the motion of defendants to decertify this action

as a class action, decertified this action as a class action, and ordered that the action shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay.

Attached hereto as Exhibit A are the names and addresses of the attorneys of record for each party.

Dated: New York, New York
September 28, 1976

MILBERG & WEISS
One Pennsylvania Plaza
New York, New York 10001
(212 594-5300

By MELVYN I. WEISS

SLONIM AND ROSS
111 South Meramec Avenue, Suite 506
St. Louis (Clayton) Missouri 63105
(314) 725-1060

Attorneys for Plaintiffs

[Exhibits Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cecil Livesay and Dorothy Livesay,
Plaintiffs,
vs.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 76-1881.

JOINT MOTION OF APPELLEES TO DISMISS THE APPEAL FOR LACK OF JURISDICTION

(Filed October 1976)

Come now defendants-appellees, Punta Gorda Isles, Inc., Wilbur H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglass, and Coopers & Lybrand, pursuant to Rule 9(b) of the Rules of the United States Court of Appeals for the Eighth Circuit, and move the court to dismiss the appeal on the ground that the order appealed from is not a final decision appealable as a matter of right under 28 U.S.C. §1291.

PEPER, MARTIN, JENSEN, MAICHEL
By: WILLIAM A. RICHTER
LEWIS R. MILLS
KAREN HOLM
Attorneys for Defendant-Appellee
Punta Gorda Isles, Inc., and the
Individual Defendants-Appellees
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850

BRYAN, CAVE, McPHEETERS &
McROBERTS
By: JOHN J. HENNELLY, JR.
VERYL L. RIDDLE
Attorneys for Defendant-Appellee
Coopers & Lybrand
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600

(Certificate of service omitted in printing)

[The opinion, judgment and denial of rehearing entered by the Court of Appeals are reproduced at pages A-3 to A-. . in the Petition for Writ of Certiorari filed by Petitioner Coopers & Lybrand in No. 76-1836.]

MILBERG & WEISS
Counsellors at Law
One Pennsylvania Plaza
New York, N. Y. 10001
(212) 594-5300

March 23, 1976

Honorable H. Kenneth Wangelin
United States District Judge
Eastern and Western Districts of Missouri
315 U.S. Court House & Custom House
St. Louis, Missouri 63101

Re: Civil Livesay, et us. v. Punta Gorda Isles, Inc., et al., Case No. 73 C. 517 (3)

Dear Judge Wangelin:

In response to your letter of March 2, 1976 requesting "objection, comments or suggestions" concerning the proposed "Notice of Pendency of Class Action."

We have no comment with respect to paragraphs 1, 2, 3, 4, 5 and 6 of the proposed Notice.

It is our opinion that paragraph 7 should at least inform the members of the class that this Court has determined that the issue of liability has been certified for class treatment. If we set forth no issues upon which this action has been certified for class treatment, we are in effect requesting joinder in a class which may not be binding on any of the issues to be litigated. Such an approach would not give the defendants the protection they are entitled to, to wit, a binding effect resulting from a determination of that issue with respect to those members of the class who do not opt out. We therefore recommend with respect to paragraph 7, the following language:

"The court has certified this action to proceed as a class action at least with respect to the issue of defendants' liability arising out of the issuance of the Punta Gorda Isles, Inc. Registration Statement and Prospectus dated May 2, 1972."

"The court has reserved decision as to whether or not with respect to other particular issues this action may be similarly maintained as a class action and will decide such questions only after the last day on which class members may exclude themselves from the class action. With respect to other issues, if determined to be appropriate for class treatment, the determination of those issues will be binding upon members of the class. In the event such issues are not determined to be appropriate for class treatment, those issues will not be decided in a manner binding upon members of the class, but will instead be treated as individual issues for determination."

With respect to paragraph 8, we suggest the addition of the following language. Following the information contained in the parenthesis in the middle of the paragraph:

> "Thereafter, plaintiffs retained new counsel who are unrelated to their original counsel."

While we see no need for the court to invite class members to petition for their appointment as "new class representatives," we understand that the court has expressed a previous desire to insert such language and rest upon our previously stated position with respect to that issue.

With respect to paragraph 10, we would like to add the word "new" after the word "their", and additionally add the name and address of Slonim & Ross, legal counsel, so that the last sentence will read:

> "You will be represented by the named plaintiffs in this action and their new counsel, Milberg & Weiss, One Penn-

sylvania Plaza, New York, New York 10001, and Slonim & Ross, 111 South Meramec Avenue, Meramec Building, Clayton, Missouri 63105."

With respect to paragraph 11, we know of no precedent for the language ". . . and you may ask the court to substitute you and your counsel for you as class representatives." We believe that such language may impede the progress of the litigation and invite many people to second guess each procedural step undertaken in the course of a complex litigation. The intervention and joinder language is a traditional manner of handling these rights and the court has amply provided for notice of such rights in this and other paragraphs of the Notice.

We have no objection to paragraph 12.

We do object to the inclusion in paragraph 13 "and any other communications commenting upon the conduct of this action." We feel it is improper to have members of the class communicate what would be normally privileged under the attorney-client privilege, to persons other than their attorneys. The Multi District Manual while under certain circumstances prohibits the attorney representing the class representatives from initiating contact with the members of the class, does not preclude communication with members of the class when initiated by the members of the class.

We hope that the above is useful and we appreciate your Honor's efforts in this matter.

Respectfully,

/s/ MELVYN I. WEISS

pc

cc: Mr. Richard Ross
Messrs. Veryl L. Riddle and
Charles G. Siebert
Mr. Walliam A. Richter

PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
Attorneys at Law
720 Olive Street, Twenty-Fourth Floor
St. Louis, Missouri 63101
(314) 421-3850

April 21, 1976

Melvyn I. Weiss, Esquire
Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

Re: Livesay vs. Punta Gorda Isles, Inc., et al.

Dear Mel:

In our telephone conversation of April 20 you requested us to furnish you a list of the initial record holders of the Punta Gorda stock and debentures sold pursuant to the May 2, 1972 registration statement. You also advised that you intend to give the notice to the initial record holders.

The Court has directed the plaintiffs to issue the notice to "all potential members of the class," as is required by **Eisen** IV. The members of the class are of course all persons who purchased the common stock or debentures at the offering pursuant to the registration statement. Issuing the notice only to the initial record holders would not satisfy the requirement that the plaintiff issue the notice to **all** potential members of the class, because those purchasers who held their securities in street name would not receive that notice. Moreover, many of the initial **registered** holders may have purchased their securities after the offering. A notice only to the initial registered holders would, therefore, have the dual defects of failing to give notice to many members of the class while giving notice to non-members of the class.

The plaintiffs must give notice to **all** the class members as required by the court and by the rule in **Eisen.** They cannot give a notice which is not reasonably calculated to reach all the members of the class, and which is directed to non-members of the class.

We do not know the names or addresses of the purchasers of the stock and debentures at the offering. The only information we have concerning transfer or registration is a list of the names of the first registered holders of the stock after the underwriters. Such information does not include addresses as we advised Mr. Feuerstein in our letter of Aug[illegible], 1975. In any event, the first holders of record after the [illegible]derwriters would include many non-class members and omit many class members. Thus a list of the first holders of record after the underwriters would be of no assistance in connection with giving the requisite notice to the class members.

In short, we do not have the information which the plaintiffs need to send the notice to all the class members.

Sincerely,
/s/ WILLIAM A. RICHTER

WAR eh

cc: Veryl Riddle